

THE OPERATION IN GAZA

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FACTUAL AND LEGAL ASPECTS

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The State of Israel

THE OPERATION IN GAZA: FACTUAL AND LEGAL ASPECTS

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I. EXECUTIVE SUMMARY

1. This detailed Paper discusses a range of factual and international legal issues relating to the military operation undertaken by the Israel Defence Forces (“IDF”) in Gaza in December 2008–January 2009 (the “Gaza Operation”).
2. The Paper has been prepared at this time in order to place the Gaza Operation in its proper factual and legal context. On a number of issues the Paper offers only a provisional analysis as the IDF is still conducting comprehensive field and criminal investigations into allegations regarding the conduct of its forces during the Operation. Such investigations will be reviewed by the Military Advocate General and are subject to further review by the Attorney General. In addition, petitions may be filed for judicial review by the Supreme Court of Israel (sitting as the High Court of Justice).
3. The Paper addresses the context of the Gaza Operation and notes that Israel had both a right and an obligation to take military action against Hamas in Gaza to stop Hamas’ almost incessant rocket and mortar attacks upon thousands of Israeli civilians and its other acts of terrorism. Israel was bombarded by some 12,000 rockets and mortar shells between 2000 and 2008, including nearly 3,000 rockets and mortar shells in 2008 alone. Hamas specifically timed many of its attacks to terrorise schoolchildren in the mornings and the afternoons. These deliberate attacks caused deaths, injuries, and extensive property damage; forced businesses to close; and terrorised tens of thousands of residents into abandoning their homes.
4. The Paper notes that Hamas constantly worked to increase the range of its weapons and that, by late 2008, its rocket fire was capable of reaching some of Israel’s largest cities and strategic infrastructure, threatening one million Israeli civilians, including nearly 250,000 schoolchildren. Hamas also orchestrated numerous suicide bombings against Israeli civilians and amassed an extensive armed force of more than 20,000 armed operatives in Gaza.
5. The Paper also describes the numerous non-military approaches Israel pursued to try to stop the attacks before commencing the Gaza Operation, including urgent appeals to the U.N. Secretary General and successive Presidents of the Security Council to take determined action, and diplomatic overtures, directly and through intermediaries, to stop the violence. Hamas nonetheless continued, and in fact escalated, its cross-border attacks. These attacks included a raid into Israeli territory from Gaza in June 2006 and the abduction of an IDF soldier, Corporal Gilad Shalit, who, more than three years later,

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remains in captivity, having been held incommunicado without access to the International Committee of the Red Cross (“ICRC”) or any other international body.

6. In a detailed legal analysis, including a survey of the relevant legal principles and State practice, the Paper notes that Israel’s resort to force in the Gaza Operation was both a necessary and a proportionate response to Hamas’ attacks. While the IDF continues to investigate specific incidents during the Operation, the Paper demonstrates that Israeli commanders and soldiers were guided by International Humanitarian Law, including the principles of distinction and proportionality. These principles, enshrined in IDF training, Code of Ethics and rules of engagement, required IDF forces to direct their attacks solely against military objectives and to try to ensure that civilians and civilian objects would not be harmed. Where incidental damage to civilians or civilian property could not be avoided, the IDF made extraordinary efforts to ensure that it would not be excessive in relation to the anticipated military advantage in each instance and as a whole. Both before and during the Gaza Operation, the IDF went to great lengths, as documented in the Paper, to ensure that humanitarian aid reached the Palestinian population, including by facilitating the delivery of 1,511 trucks carrying 37,162 tons.
7. By contrast, both before and during the Gaza Operation, Hamas committed clear grave violations of international law. The Paper documents Hamas’ deliberate rocket and mortar attacks against Israel’s civilian population, which violated the international law prohibition on deliberate attacks against civilians and civilian objects. It also documents deliberate Hamas tactics that put Gaza’s civilian population in grave danger. These included the launching of rocket attacks from within densely populated areas near schools and protected U.N. facilities, the commandeering of hospitals as bases of operations and ambulances for transport, the storage of weapons in mosques, and the booby-trapping of entire civilian neighbourhoods so that an attack on one structure would devastate many others. These actions, which are clearly shown in photographic and video evidence throughout the Paper, violated international law. Many of the civilian deaths and injuries, and a significant amount of the damage to property during the Gaza Operation, was attributable to Hamas’ tactic of blending in with the civilian population and its use of, or operations near, protected facilities and civilian property. The Paper also notes the direct injury and damage caused to Palestinians by the explosion of Hamas’ weapons factories and the falling of rockets short of their targets on Palestinians in Gaza.
8. The Paper addresses the acute dilemmas faced by Israel in confronting an adversary using its own civilian population as a shield. It details the extensive precautions taken by the IDF to avoid or limit harm to civilians in Gaza, while still having to achieve the necessary

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objective of stopping Hamas' constant rocket and mortar fire on Israeli civilians and property. The IDF not only checked and cross-checked targets and used the least destructive munitions possible to achieve legitimate military objectives; it also implemented an elaborate system of warnings, including general warnings to civilians (through media broadcasts and leaflets) to avoid or minimise the presence of civilians in areas and facilities used by Hamas, regional warnings to alert civilians to leave specific areas before IDF operations commenced, and specific warnings (through telephone calls and warning shots to rooftops) to warn civilians to evacuate specific buildings targeted for attack. The IDF dropped more than 2.5 million leaflets and made more than 165,000 phone calls warning civilians to distance themselves from military targets.

9. In this Paper, Israel acknowledges that, despite the precautions taken, the Gaza Operation resulted in many civilian deaths and injuries and significant damage to public and private property in Gaza. Israel makes no attempt to minimise the human costs incurred. As former Prime Minister Olmert stated at the close of the conflict: "On behalf of the Government of Israel, I wish to convey my regret for the harming of uninvolved civilians, for the pain we caused them, for the suffering they and their families suffered as result of the intolerable situation created by Hamas."
10. In analysing the legal aspects of the conflict, the Paper notes that civilian deaths and damage to property, even when considerable, do not necessarily mean that violations of international law as such have occurred. In particular, the principles of distinction and proportionality are only violated when there is an intention to target civilians or to target military objectives with the knowledge that it would cause harm to civilians that is excessive in relation to the anticipated military advantage. Hamas' deliberate attacks against Israel's civilian population violated such standards and thus constituted a violation of international law. The IDF's attacks directed against Hamas military targets, despite their unfortunate effects on Gaza's civilian population, did not.
11. The Paper also gives a detailed account of Israel's efforts to coordinate and facilitate humanitarian relief and assistance to the Palestinians in Gaza. It also documents repeated Hamas abuses of these arrangements, including Hamas' launching of attacks during humanitarian pauses and directed at crossing points, and Hamas' hijacking and theft of humanitarian supplies intended for those in need.
12. The Paper also gives previously unpublished details of the multiple IDF investigations into allegations made by various groups that violations of the law were committed. IDF investigative teams are currently examining approximately 100 complaints, including 13

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criminal investigations opened so far, and will examine more complaints if and when filed. The Paper sets forth the preliminary findings of some of the IDF field investigations, including investigations relating to allegations concerning 1) incidents where U.N. and international facilities were fired upon or damaged; 2) incidents involving shooting at medical facilities, buildings, vehicles, and crews; 3) certain incidents in which many civilians were harmed; 4) the use of munitions containing white phosphorous; and 5) destruction of private property and infrastructure by ground forces. It provides as much information as can be released with regard to the investigations currently underway without comprising the integrity and independence of these investigations.

13. The field investigations constitute only the preliminary stage of an extensive legal process. They are subject to independent review by the Military Advocate General, who may order the opening of a criminal investigation. The decisions of the Military Advocate General are subject to review by the Attorney General and may also be reviewed by the Israeli Supreme Court (sitting as the High Court of Justice). Israel's system for investigating alleged violations, including its judicial review process, is internationally recognised as thorough and independent; its procedures and institutions are similar to those in other Western countries.
14. Israel deeply regrets the civilian losses that occurred during the Gaza Operation. But Israel has both the responsibility and the right under international law, as does every State, to defend its civilians from intentional rocket attacks. It believes that it discharged that responsibility in a manner consistent with the rules of international law. Israel is committed to a thorough investigation of all allegations to the contrary and to making the results of these investigations and subsequent reviews public when they are completed.

II. INTRODUCTION

15. Democratic States today frequently face attacks from non-State actors seeking to terrorise civilian populations. For eight years, Hamas, a terrorist organisation avowedly dedicated to the destruction of Israel, has launched deliberate attacks on Israeli civilians, from suicide bombings to incessant mortar and rocket attacks. Since October 2000, Hamas and other terrorist organisations unleashed more than 12,000 rockets and mortar rounds from the Gaza Strip at towns in Southern Israel. Even though Israel withdrew from the Gaza Strip in August 2005, the attacks continued. Even though Israel made repeated diplomatic efforts, including appeals to the U.N. Security Council, to end the violence, the attacks continued. The death, injuries and — as Hamas intended — terror among the civilian population, including children, were intolerable, particularly as Hamas increased the range and destructiveness of its attacks.
16. Under international law, Israel was entitled to take military action to stop the thousands of deliberate rocket and mortar attacks that had killed or wounded Israeli civilians and that threatened and terrorised hundreds of thousands more. Israel is a sovereign State, with a moral and legal obligation, and an inherent right under international law, to protect its citizens from terrorism. No nation is required to submit to terrorist attacks. Every nation has a right and an obligation to stop them. After exhausting other options, that is what Israel sought to do in its operation in Gaza, between 27 December 2008 and 17 January 2009 (the “Gaza Operation,” also known as “Operation Cast Lead”) — to eliminate the weapons and the infrastructure that Hamas had used to launch attacks against Israeli civilians on thousands of occasions, and to prevent those attacks from recurring.
17. For a State, like Israel, that recognises its obligation to minimise harm to civilians, responding to and preventing such attacks poses operational, legal and moral challenges. Hamas amplified those challenges, by using the civilian population in Gaza to shield its military operations during Israel’s recent intervention. Confronted with those tactics, Israel took extraordinary steps to avoid harming civilians in its Gaza Operation while protecting its own population from continued deliberate attacks and its soldiers from hostile fire.
18. Nonetheless, in many cases, the results of the Gaza Operation were unfortunate. Civilians were killed or injured, and private property as well as Gaza’s public infrastructure were damaged. Israel in no way seeks to dismiss those tragedies or to devalue the human loss incurred. As then-Prime Minister Olmert said to the citizens of Gaza, “Your suffering is terrible. Your cries of pain touch each of our hearts. On behalf of the Government of

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Israel, I wish to convey my regret for the harming of uninvolved civilians, for the pain we caused them, for the suffering they and their families suffered as a result of the intolerable situation created by Hamas.”¹ But as tragic as those casualties were, the mere fact that they occurred does not in and of itself mean that Israel did not have a right — indeed a duty — to protect its citizens against the incessant terror emanating from Gaza, or that in its various operations it violated applicable international law norms while doing so, as some have been quick to accuse.

19. Compliance with applicable international law norms is a cornerstone in the IDF rules and policies. In the aftermath of the Gaza Operation, IDF launched multiple investigations into the allegations made by various groups that the IDF had violated international law. Many of the IDF investigations are continuing, and even those for which the first stage — an IDF field review — is now complete, will be subject to further independent review, first by the Military Advocate General, and thereafter is subject to the review of the Attorney General of Israel as part of the civilian legal system. In addition, they ultimately may be subject to review by the Supreme Court, if such a petition is filed. Israel is committed to fully and fairly investigating all allegations of misconduct, and to taking appropriate action, including sanctioning IDF commanders or soldiers found to have committed offences. This is no hollow promise. Numerous outside observers have confirmed the rigor of Israel’s system for investigating such allegations including, ultimately, judicial review of the conclusions. Indeed, the international respect for the Israeli system was apparent just a few weeks ago when the National Court of Spain rejected Spanish jurisdiction over a case involving previous incidents in Gaza, on the basis of a finding that Israel was investigating the incidents itself and that Israel’s system of appellate review was independent and impartial.
20. Some in the international community nonetheless appear to have reached conclusions without waiting for the evidence — to have inferred from the fact of civilian casualties and the damage to civilian property that Israel violated international law. Reports by non-governmental organisations and others have levelled numerous charges about specific incidents in the Gaza Operation. Israel has not yet fully reviewed those claims, although processes are underway to do that. But because of the rush to judgment and the myriad accusations of legal violations, generally without pause to consider what International Humanitarian Law actually requires, it is important to release this Paper now, to place the

¹ A speech made by the then-Prime Minister, Ehud Olmert on 17 January 2009 following the Cabinet meeting that day, during which the Cabinet decided to enact an Israeli ceasefire.

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Gaza Operation into its proper legal and factual context and to answer propaganda and prejudice with facts and law.

21. It should be noted that presenting a full and accurate picture of the conflict is a complex and challenging task. Hamas' *modus operandi* means that damage to civilian structures in Gaza remains apparent for all to see, while the weapons and terrorists they concealed there are long gone. Moreover, making public the sensitive information needed to present a full picture — including the intelligence on which operational decisions were made and the techniques used to counter Hamas' tactics — is fraught with security concerns. The conflict with Hamas is not over. It remains a terrorist organisation and is in control of the Gaza Strip. And it still seeks the destruction of Israel. For Israel to reveal its own strategies and capabilities, or how Hamas' weapons succeeded or failed, would enable Hamas further to refine its tactics and threaten the lives of Israeli soldiers and civilians.
22. Nonetheless, this Paper has assembled and analysed a substantial record on a number of specific incidents subject to the greatest public criticism. That record makes clear that the principal charges regarding the Gaza Operation rest on incomplete and often inaccurate information, that they do not take into account the devastating impact of Hamas' abuses on the population of Gaza, and that they do not reflect the applicable principles of the Law of Armed Conflict. Notwithstanding the tragic civilian casualties in Gaza, the evidence analysed thus far demonstrates that Israel took extensive measures to comply with its obligations under international law.
23. More specifically, Hamas chose deliberately and systematically to exploit Palestinian civilians as shields for military targets in the IDF's Gaza Operation. It did not provide any protection for the civilian population. Instead, it exposed the Palestinian civilian population of Gaza to additional harm. With the intent of exploiting the civilian population, Hamas stored explosives and weapons in and around schools, mosques, U.N. facilities and homes, even though other storage sites were available. It used medical facilities and ambulances for military purposes, exploiting the protected status of medical sites and restricting effective care for civilians. It repeatedly fired mortars and other weapons from locations adjacent to U.N. schools and medical facilities, and from the roofs of residential apartment buildings. It used individual civilians as human shields to protect Hamas terrorists. And it turned civilian neighbourhoods into battlefields, by digging warrens of tunnels lined with explosives and booby-trapping residential buildings in order to cause their collapse at the outset of any IDF incursion. In short, Hamas made the likelihood of harm to the citizens and homes of Gaza the centrepiece of its defensive strategy, to inhibit Israeli attacks and to score propaganda coups and vilify Israel when

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- Israel tried to attack a legitimate military objective and unintended civilian casualties resulted.
24. Hamas' tactics, however, could not legally prevent Israel from defending its own population, nor bar the IDF from protecting its soldiers under fire. Israel's obligations under International Humanitarian Law were, *inter alia*, to direct attacks against combatants and military objects, to take precautions that were feasible and that would still allow the IDF to achieve its legitimate military objectives, and not to carry out attacks which were likely to cause collateral damage excessive in relation to the military advantage anticipated. Israel fulfilled this obligation. The IDF chose its targets against Hamas terrorists, materiel, and facilities in accordance with international law and as carefully as possible despite a rapidly unfolding situation. The Israeli armed forces dropped leaflets warning occupants to stay away from Hamas strongholds and leave buildings that Hamas was using to launch attacks. It attempted to contact occupants by telephone, to warn of impending attacks on particular buildings. It fired warning shots that hit the roofs of structures before attacking them. It checked and double-checked the coordinates of weapons firing on IDF positions. And it attempted to use the most precise weapons available, applying no more force than necessary to achieve its legitimate military objectives. Israel's use of shells containing white phosphorous as a smoke obscurant, for example, was consistent with — and not prohibited by — applicable rules of international law and permitted the IDF to avoid the use of high explosives and munitions that would have otherwise been necessary to protect Israeli forces.
 25. These IDF's mode of operation reflected the extensive training of IDF soldiers to respect the obligations imposed under international law and to adhere to the IDF Code of Ethics. Further, the conduct of the IDF in the Gaza Operation evidenced the longstanding efforts in the IDF to reinforce awareness of these obligations among commanders and soldiers, to investigate alleged infringements, and to punish violations. The IDF's procedures are very similar to those of other democracies.
 26. Certainty and precision, however, are elusive in military conflicts, and, in the heat of battle, commanders must make agonising, complex and hazardous decisions affecting the lives of their soldiers, the achievement of their military mission and the safety of civilians. Experience — including the NATO bombings of the former Yugoslavia and operations in Afghanistan and Iraq by the United States, the United Kingdom and others — has shown that even the most sophisticated systems and the most rigorous training cannot prevent all civilian casualties and damage to public and private property. Hamas' cynical choice of tactics — including the unlawful strategy of deliberately shielding their operatives and

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munitions in civilian buildings and protected sites — made difficult, complex and hazardous battlefield decisions by IDF even *more* difficult, *more* complex, and *more* hazardous. While Hamas has inflated the number of casualties to inflame world opinion, Israel is nevertheless acutely aware that many innocent Palestinians were killed or injured. The fact that civilian casualties were the inevitable result of Hamas' criminal mode of operations, however, does not diminish Israel's deep sadness regarding each and every one of them. Had it been possible to protect the civilian population of Israel from Hamas' terrorist attacks without civilian casualties in Gaza, Israel would have done so.

III. THE APPLICABLE LEGAL FRAMEWORK

27. Israel faces many of the problems faced by other democratic States, as they try to conduct military operations against terrorists who violate the most fundamental principles of international law. The purpose of this Paper is not to set forth an exhaustive analysis of the relevant law regarding those military operations. Israel has articulated in other forums, including its Supreme Court, its long-standing commitment to applicable human rights standards and humanitarian principles relevant to situations of armed conflicts. This Paper will focus on, and then apply, certain basic legal principles applicable to the Gaza Operation. These principles are described further in Sections IV.C and V.A. At the outset, though, it is important to emphasise four basic propositions.
28. First, the applicable legal framework for assessing the recent operations in Gaza is the “Law of Armed Conflict,” also known as “International Humanitarian Law.”² According to the decision of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) in the *Tadić* case, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.”³ The conflict between Israel and Hamas in Gaza meets this definition.⁴ Hamas is a highly organised and well-armed group that uses armed force against Israel, and, indeed, considers such armed struggle to be its primary mission. By any measure, the conflict between Israel and Hamas has been protracted, spanning many years and intensifying in recent years as Hamas tightened its unlawful grip on Gaza.
29. Generally, international law recognises two kinds of armed conflicts: “international armed conflict” and “non-international armed conflict.”⁵ Each has its own rules, although many of the basic provisions are common to both. It is not yet settled which regime applies to cross-border military confrontations between a sovereign State and a non-State terrorist armed group operating from a separate territory.

² This Paper will use the term “Law of Armed Conflict” in its ordinary sense — describing the legal obligations of parties to an armed conflict in the course of their military operations. International Humanitarian Law is used by many commentators and countries as an interchangeable term. Israel, like many other countries, prefers the term Law of Armed Conflict.

³ *Prosecutor v. Tadić*, International Criminal Tribunal for the former Yugoslavia (“ICTY”), Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, at ¶ 70, 2 October 1995.

⁴ For the sake of convenience, this Paper hereafter refers to Hamas only, but this should be seen as a reference to all terrorist organisations that took part in the fighting in Gaza during the recent conflict.

⁵ The law of international armed conflicts has traditionally been used for fighting across borders between sovereign States, while the law of non-international armed conflicts has traditionally been applied within the boundaries of a State, such as civil wars or insurgencies.

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30. In this case, the Gaza Strip is neither a State nor a territory occupied or controlled by Israel.⁶ In these *sui generis* circumstances, Israel as a matter of policy applies to its military operations in Gaza the rules of armed conflict governing both international and non-international armed conflicts. At the end of the day, classification of the armed conflict between Hamas and Israel as international or non-international in the current context is largely of theoretical concern, as many similar norms and principles govern both types of conflicts.
31. Some of the rules governing the use of force in armed conflicts are set forth in treaties, such as the Geneva Conventions of 1949 and the Regulations annexed to the Fourth Hague Convention of 1907.⁷ Others have gained acceptance by the practice of the international community and become part of customary international law. The Israeli High Court has ruled that these customary international law rules bind Israel under both international law and Israeli law.⁸ In particular, Israel's High Court of Justice has confirmed that in the ongoing armed conflict with Palestinian terrorist organisations, including Hamas, Israel must adhere to the rules and principles in (a) the Fourth Geneva Convention,⁹ (b) the Regulations annexed to the Fourth Hague Convention (which reflect customary international law), and (c) the customary international law principles reflected in *certain* provisions of Additional Protocol I to the Geneva Conventions on 1949.¹⁰ Israel is not a party to the Additional Protocol I, but accepts that some of its provisions accurately reflect customary international law.¹¹
32. The second basic proposition is that the actions of Hamas must also be measured against accepted principles and applicable rules of international law. As the Appeals Chamber of the Special Court for Sierra Leone held in 2004, "it is well settled that all parties to an

⁶ The High Court of Justice recognized last year that "since September 2005 Israel no longer has effective control over what happens in the Gaza Strip," and thus no longer can be considered an "occupying power" under international law. *Jaber Al-Bassiouni v. The Prime Minister of Israel*, HCJ 9132/07 at ¶ 12 (30 January 2008), available at <http://elyon1.court.gov.il/verdictsSearch/EnglishStaticVerdicts.html>.

⁷ Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907) (hereafter "Hague Convention IV").

⁸ *Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02 at ¶ 19 (11 December 2005).

⁹ IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949) (hereafter "Geneva Convention IV").

¹⁰ Additional Protocol I to the Geneva Convention of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (hereafter "Additional Protocol I").

¹¹ *Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02 at ¶ 20 (11 December 2005).

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armed conflict, whether states or non-state actors, are bound by International Humanitarian Law, even though only states may become parties to international treaties.”¹²

33. The third core proposition in this Paper is that the Law of Armed Conflict balances two competing considerations. According to Judge Greenwood, “[i]nternational humanitarian law in armed conflicts is a compromise between military and humanitarian requirements. Its rules comply with both military necessity and the dictates of humanity.”¹³
34. The final core proposition that runs through this Paper is that, while the principles of customary international law may be “basic” and can be simply stated, they nevertheless must be applied with analytical rigor. Reports by non-governmental organisations and rapporteurs and committees acting under mandates from international organisations too often jump from reporting tragic incidents involving the death or injury of civilians during armed combat, to the assertion of sweeping conclusions within a matter of hours, days or weeks, that the reported casualties *ipso facto* demonstrate violations of international law, or even “war crimes.”¹⁴ Often, these leaps of logic bypass the most basic steps, such as identification of the specific legal obligation at issue and explanation of how it was violated. The depth of feeling in the face of civilian losses is understandable, but it does not excuse this rush to judgment. It is a fundamental precept of the rule of law that any legal inquiry about events relating to armed conflicts cannot assume the conclusion, particularly a conclusion that — as shown below — proper application of the law does not sustain.¹⁵
35. The appropriate starting point for a proper analysis is the central distinction between the legality of a State’s resort to force in particular circumstances (*jus ad bellum*), and the legality of particular uses of force during hostilities (*jus in bello*). Again, too often the two inquiries are collapsed into one, such that concerns about particular incidents — which

¹² *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), at ¶ 22, 31 May 2004. See also Christopher Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 45, 76 (Dieter Fleck ed., 2d ed. 2008) (explaining that “[t]he obligations created by international humanitarian law apply not just to states but to individuals and to non-state actors such as a rebel faction or secessionist movement in a civil war.”).

¹³ Christopher Greenwood, *Scope of Application of Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 37 (Dieter Fleck ed., 2d ed. 2008).

¹⁴ See, e.g., Report, *Operation Cast Lead: 22 Days of Death and Destruction*, Amnesty International (29 June 2009); Report of the Independent Fact Finding Committee on Gaza, *No Safe Place.*, League of Arab States (30 April 2009); Report, *Rain of Fire: Israel’s Unlawful Use of White Phosphorus in Gaza*, Human Rights Watch (March 2009).

¹⁵ Cf. Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 14 June 2000 (hereafter “NATO Bombings, Final Report to the ICTY Prosecutor”), ¶ 51, available at <http://www.un.org/icty/pressreal/nato061300.htm> (“[m]uch of the material submitted to the OTP consisted of reports that civilians had been killed, often inviting the conclusion to be drawn that crimes had therefore been committed.” Yet in truth, “[c]ollateral casualties to civilians and collateral damage to civilian objects can occur for a variety of reasons.”).

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may involve the decisions individual commanders or soldiers make in the midst of battle — prompt sweeping assertions about the legality of military operations as a whole. This Paper treats these separate inquiries separately. Section IV addresses issues regarding the resort to force, based on the broader context of the Gaza Operation. Section V addresses issues regarding particular uses of force.

IV. THE CONTEXT OF THE OPERATION

A. The Ongoing Armed Conflict with Hamas

36. Israel has been engaged in an ongoing armed conflict with Hamas and other Palestinian terrorist organisations since the massive outbreak of armed terrorist violence and hostilities in October 2000, what the Palestinians have termed the *Al Aqsa Intifadah*. The terrorist attacks against Israelis have included suicide bombings in the heart of Israeli cities, shooting attacks on vehicles, murders of families in their homes, and unrelenting rocket and mortar fire on Israeli towns and villages — all told resulting in the deaths of more than 1,100 Israelis, the wounding of thousands more, and the terrorisation of millions.
37. Hamas has launched terrorist attacks on Israel's civilian population as a weapon of choice in order to achieve its strategic goals – to disrupt negotiations between Israel and the Palestinian Authority and to prevent a peaceful resolution of the conflict in the Middle East. Hamas has sought to paralyse normal civilian life. By murdering Israelis and threatening civilian communities in Israel. Hamas has pushed its agenda as expressed in its founding Charter, namely, to destroy and inflict terror upon civilian communities in Israel, and Hamas has sought to promote its long-term political agenda, as stated in its Charter, to exterminate the State of Israel and establish a Muslim state over all the territory of historic “Palestine.”¹⁶ The Hamas Charter begins by declaring that “Israel will arise and continue to exist until Islam wipes it out,” and rejects all “[peace] initiatives, the so-called peaceful solutions and international conferences,” because they “contradict the Islamic Resistance Movement's ideological position.” It emphasises that “there is no solution to the Palestinian problem except Jihad . . . the international initiatives, suggestions and conferences, they are an empty waste of time, and complete nonsense.”¹⁷ And it calls for the killing of Jews because they are Jews.¹⁸ In other words, Hamas does not acknowledge the right of Israel to exist, nor any role for diplomacy, either direct or indirect. Its Charter espouses a militantly anti-Semitic world view, stating that “[n]o war takes place anywhere in the world without [the Jews] behind the scenes having a hand in it.”¹⁹
38. Hamas has chosen, in particular, to launch extensive and almost incessant rocket and mortar attacks against civilian communities in Southern Israel. For the eight years

¹⁶ The Hamas Charter is available at

http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_charter.pdf.

¹⁷ Hamas Charter, art. 13. The Oxford English Dictionary (2d ed. 1989) defines Jihad as “[a] religious war of Muslims against unbelievers in Islam, inculcated as a duty by the Koran and tradition.”

¹⁸ Hamas Charter, art. 7.

¹⁹ Hamas Charter, art. 22.

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preceding the Gaza Operation at issue in this Paper, Hamas and other terrorist organisations (such as “Palestinian Islamic Jihad” and the “Popular Resistance Committees”) launched more than 12,000 rockets and mortar rounds from the Gaza Strip at the towns in Southern Israel. The daily attacks began in 2000 and have continued since that time with only brief respites in the violence.

39. In August 2005 Israel withdrew from the Gaza Strip, terminating its civilian and military presence there. Hamas exploited this disengagement to promote its terrorist agenda and publicly endorsed terrorism as the preferred tool for achieving its political goals. For instance, on 30 March 2007 Hamas spokesman Ismail Radwan issued a call to “liberate Palestine” by attacking and killing Jews rather than by engaging in diplomatic efforts.²⁰
40. In June 2007 Hamas executed a violent and bloody *coup d'état* in the Gaza Strip, persecuting some of the leaders and members of Fatah and the legitimate Palestinian Authority, neutralising the Palestinian Authority's military and political power and setting up a radical Muslim entity in its place. Since then, Hamas' control of Gaza has been due not to the election of 2006, but to the *coup*. The new entity, aided and abetted by Iran and Syria, wages an ongoing terrorist campaign against Israel, and operates separately and in defiance of the legitimate Palestinian Authority in the West Bank. Hamas has fortified the Gaza Strip as a launching pad for terrorist attacks against residential communities in Southern Israel.

B. Hamas' Increasing Attacks on Israel During 2008

41. Following Hamas' violent takeover of the Gaza Strip, the frequency and intensity of rocket and mortar attacks on Israel increased dramatically. In 2008 alone, nearly 3,000 rockets and mortars were fired,²¹ despite the six relatively calm months of the lull (“*Tahadiya*”),²² which Hamas and other terrorist organisations used to rearm and prepare for the next round of hostilities. On 19 December 2008, Hamas unilaterally terminated the lull and resumed the use of the Gaza Strip as a launching pad for terrorist activities. Consequently, Israeli civilians, confronted with daily attacks on their homes, schools, kindergartens, shops,

²⁰ See Intelligence and Terrorism Information Center, *Hamas spokesman Ismail Radwan delivered a hate-filled sermon...*, 11 April 2007, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e_sermon.htm.

²¹ See Intelligence and Terrorism Information Center, *Summary of Rocket Fire and Mortar Shelling in 2008*, 1 January 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/ipc_e007.pdf.

²² On 17 June 2008, after several months of indirect contacts between Israel and Hamas through Egyptian mediators, Egypt and Hamas individually announced that a lull arrangement had been reached between Israel and the Palestinians in the Gaza Strip. The lull arrangement was based on unwritten understandings and called for the cessation of the fighting in the Gaza Strip.

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clinics, factories and other civilian infrastructure, raced to bomb shelters several times a day and lived in constant fear of where the next rockets would hit.

42. Responding to the ongoing threat of rocket and mortar attacks on civilian communities in Southern Israel, Israeli authorities took a variety of measures to protect its citizens and to reduce the risk to civilians, with special attention being given to sensitive facilities, such as educational institutions and hospitals. These efforts included the establishment of public shelters and fortification of public institutions, as well as the instruction of the population in risk how to act in times of emergency.
43. In light of the growing number of rocket attacks in the latter part of 2008, the Israeli Government and the Home Front Command stepped up the efforts to protect Israeli citizens living within range of rocket fire. On 7 December 2008, the Government decided to approve a special budget to fortify existing shelters in localities within a 4.5 kilometre range of the Gaza border at a cost of 327 million NIS (83 million U.S. Dollars). This project was carried out with the cooperation of various government agencies, including the Ministry of the Interior and the Ministry of Construction and Housing, which provided expedited permits to allow local municipalities to execute the decision.²³
44. Furthermore, the Home Front Command distributed informational booklets to all homes within rocket range. These booklets included emergency contact numbers, updated instructions on how to choose and build a “safe space” within a house, as well as thorough instructions on behaviour during rocket and mortar attacks. Civilians were instructed regarding behaviour in a variety of situations, including while driving, while at home and while in an open space. Depending on their distance from Gaza, citizens were advised regarding the amount of time available to seek shelter from the moment a siren sounded. Road signs were posted along roads within rocket range, advertising a designated radio station which broadcast the siren in the event of rocket fire. Signs clearly marking the nearest shelter were posted in all public spaces, including supermarkets, shopping malls, educational facilities, government buildings and hospitals.
45. To ensure accessibility to this information by all the citizens under the threat of rocket and mortar attacks, the Home Front Command provided detailed instructions online in Hebrew, Arabic, English, Russian, Amharic, French and Thai. Instructional videos on “How to

²³ Based on information currently available, Israel's investment in shielding and protecting schools and civilians' houses between the years 2005 – 2011 will amount to approximately 1,798 million NIS (\$461 million). In 2008 alone, 260.5 million NIS (\$66.79 million) were invested in such shielding, while 630 million NIS (\$161.5 million) were further allocated for civilian shielding projects during 2009, 277 million NIS (\$71 million) during 2010 and 200 million NIS (\$51.3 million) during 2011.

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Behave in a Qassam Rocket or Mortar Attack” were also available online in a number of languages.²⁴ During the operation in Gaza, the Home Front Command also published detailed daily instructions regarding the necessary precautions. Civilians were discouraged from gathering outside and encouraged to always stay close to a fortified shelter. Schools that did not have adequate shelters and facilities were shut down for the duration of the campaign.

46. The Home Front Command used the most sophisticated equipment to detect the launching of rockets and sounded air raid sirens whenever a rocket launch was detected. These sirens could, at most, provide advance notice seconds before a rocket struck, and had no way of providing advance warning when a mortar was launched. Nevertheless, were it not for such warnings, as well as the use of other measures discussed above, the human casualties from Hamas’ bombardment undoubtedly would have been substantially greater. Even so, many people and buildings have survived by pure chance. The number of such close calls is enormous. As of July 2008, *before* the escalation that led to the Gaza Operation, nearly 92 percent of the residents of Sderot (a city of nearly 20,000 persons) had heard or seen a rocket land nearby, 56 percent had shrapnel fall on their homes, and 65 percent knew someone who had been injured.²⁵
47. During these eight years of fire, the impact on the Israeli population of the daily barrage of rockets was debilitating. The tactics are termed “terrorism” for a reason. Studies have documented an entire generation of children traumatised by the terror of rocket strikes and the helplessness of adults to ensure their safety.²⁶ Hamas increased the terror engendered by its attacks by timing them to coincide with the time when children were on their way to school in the morning or were returning in the afternoon.
48. Hamas’ attacks inflicted death, injury and extensive property damage,²⁷ forced businesses to close and terrorised tens of thousands of residents into abandoning their homes. Statistics do not capture the full impact of these terrorist acts.²⁸

²⁴ The video is available at <http://www.oref.org.il/315-en/PAKAR.aspx>.

²⁵ Toni O’Loughlin, *Middle East Deadly Divide: Children of Conflict*, The Guardian, 15 July 2008, available at <http://www.guardian.co.uk/world/2008/jul/15/israelandthepalestinians.middleeast>.

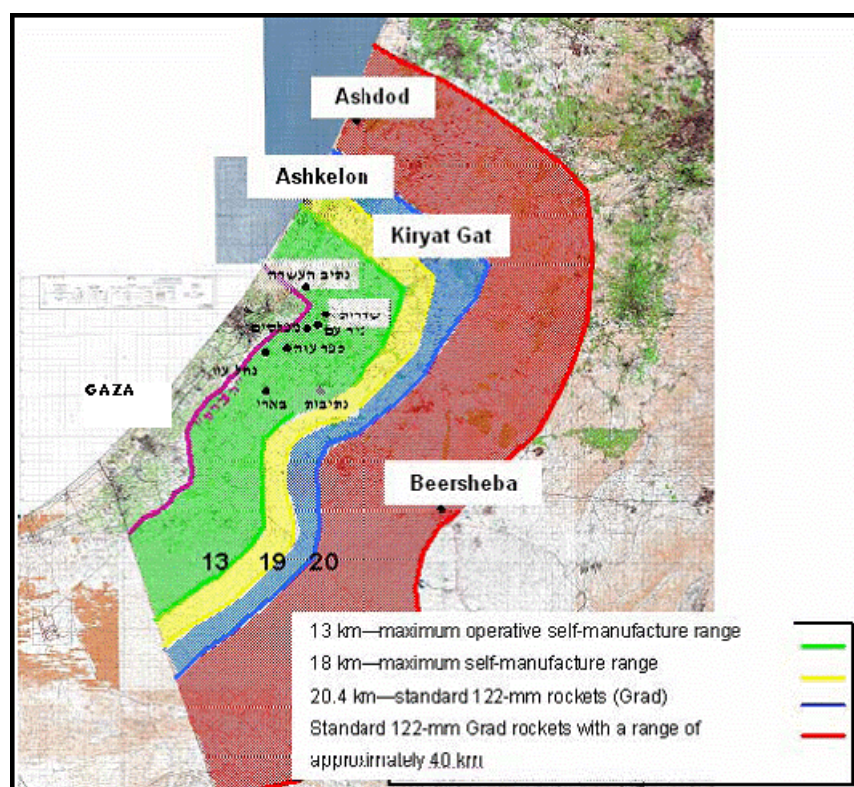
²⁶ According to one study of the psychological effects on the residents of Sderot, “children aged seven to 12 suffered most, with 74% experiencing extreme fear, 67% refusing to talk or visit places that remind them of an attack, and 57% enduring nightmares and other sleep difficulties.” *Id.*

²⁷ Based on information currently available, due to the incessant deliberate rocket and mortar attacks on Southern Israel, between 2006 and July 2009, approximately 13,000 compensation claims due to property damage were submitted to the Israel Tax Authority, and approximately 410 million NIS (\$105 million) was granted, of which approximately 290 million NIS (\$74.3 million) was a direct result of the Gaza Operation. It is estimated that the damages will amount to approximately 500 million NIS (\$128.2 million). As for direct damage caused to buildings or

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49. Over time, Hamas extended the range of the rocket fire, by late 2008 reaching as far as some of Israel's largest cities, including Ashkelon (with a population of over 110,000), Ashdod (with a population of 210,000) and Be'er Sheva (with a population of over 185,000), *and* threatening one million Israeli civilians — almost 15 percent of the Israeli population — as well as Israeli strategic installations, such as major electricity and gas-storage facilities. Hamas frequently fired rockets towards these installations, even though some of these facilities served the Palestinian population in Gaza. The following map illustrates the increasing range of Hamas' daily rocket attacks, super-imposed upon a map of Southern Israel identifying some of the major population centres exposed to such attacks.



- More than 200 Israeli cities and towns are within range of Hamas rockets from Gaza

50. These rocket attacks were intended to reach strategic sites, such as the Ashdod port and power stations in Ashkelon and Ashdod, a direct hit on which would cause substantial

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property as a result of a rocket or mortar attacks, 2,400 claims, amounting to a total of approximately 31 million NIS (\$7.95 million) were submitted in 2008, in addition to 2,300 additional claims between January and July 2009, of which a total of approximately 25 million NIS (\$6.4 million) was granted thus far.

²⁸ Reports from NGOs and the press have confirmed the physical and mental toll taken on Israeli civilians, from attacks that were deliberately directed at the civilian population. *See, e.g.*, Personal Stories, Natal: Israel Trauma Center for Victims of Terror and War, available at <http://natal.org.il/English/?CategoryID=260>.

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harm. Hospitals within target range included the Barzilai Medical Center in Ashkelon (with capacity of 500 hospitalisation beds) and the Soroka University Medical Center in Be'er Sheva (with a capacity of 1,000 hospitalisation beds). Educational institutions within the 40-kilometre rocket range of Hamas' mortar and rocket attacks included the Ben-Gurion University in Be'er Sheva (almost 20,000 students) and several academic colleges. One of these colleges — Sapir Academic College (with more than 8,000 students) has been regularly targeted by Hamas, and on 27 February 2008, a Qassam rocket killed an Israeli citizen in the college compound. There are also 2,200 primary and secondary schools within the range of the rockets. These institutions include 1,701 kindergartens (with 52,226 children) and 499 schools (with 196,466 children). There are a total of 248,692 students within rocket range.

51. Had the onslaught of rocket attacks continued unabated, it was only a matter of time before a direct hit on a school, hospital or other public facility would have caused extensive loss of life. It was inevitable that civilian casualties, economic loss and the overall impact of these terrorist assaults would have mounted.
52. To stop the attacks, Israel exhausted a variety of non-military options before launching air and later ground operations against Hamas in December 2008 and January 2009. In the eight years preceding Israel's decision to launch the Gaza Operation, Israel sent dozens of letters to the Secretary General of the United Nations and the President of the Security Council, describing the Qassam rocket shelling of Israeli town and cities and suicide attacks on Israeli civilians.²⁹ Israel sent similar letters to the Under-Secretary General for

²⁹ See, e.g., Letters of 3 October 2000 (U.N. Doc. S/2000/937 • A/55/441), 7 October 2000 (U.N. Doc. S/2000/970 • A/55/460), 11 October 2000 (U.N. Doc. S/2000/980 • A/55/470), 12 October 2000 (U.N. Doc. S/2000/985), 20 October 2000 (U.N. Doc. S/2000/1007 • A/55/508), 2 November 2000 (U.N. Doc. S/2000/1065 • A/55/540), 20 November 2000 (U.N. Doc. S/2000/1108 • A/55/634), 22 November 2000 (U.N. Doc. S/2000/1114 • A/55/641), 29 December 2000 (U.N. Doc. S/2000/1252 • A/55/719), 1 January 2001 (U.N. Doc. S/2001/1198 • A/56/706), 2 January 2001 (U.N. Doc. S/2001/2 • A/55/725), 23 January 2001 (U.N. Doc. S/2001/71 • A/55/742), 25 January 2001 (U.N. Doc. S/2001/81 • A/55/748), 2 February 2001 (U.N. Doc. S/2001/103 • A/55/762), 9 February 2001 (U.N. Doc. S/2001/125 • A/55/777), 13 February 2001 (U.N. Doc. S/2001/132 • A/55/781), 14 February 2001 (U.N. Doc. S/2001/137 • A/55/787), 2 March 2001 (U.N. Doc. S/2001/187 • A/55/819), 6 March 2001 (U.N. Doc. S/2001/193 • A/55/821), 7 March 2001 (U.N. Doc. S/2001/197 • A/55/823), 14 March 2001 (U.N. Doc. S/2001/24 • A/55/730), 19 March 2001 (U.N. Doc. S/2001/244 • A/55/842), 26 March 2001 (U.N. Doc. S/2001/278 • A/55/858), 27 March 2001 (U.N. Doc. S/2001/280 • A/55/860), 29 March 2001 (U.N. Doc. S/2001/291 • A/55/863), 16 April 2001 (U.N. Doc. S/2001/364 • A/55/901), 23 April 2001 (U.N. Doc. S/2001/396 • A/55/910), 1 May 2001 (U.N. Doc. S/2001/435 • A/55/924), 9 May 2001 (U.N. Doc. S/2001/459 • A/56/69), 11 May 2001 (U.N. Doc. S/2001/473 • A/56/72), 18 May 2001 (U.N. Doc. S/2001/506 • A/56/78), 25 May 2001 (U.N. Doc. S/2001/524 • A/56/80), 30 May 2001 (U.N. Doc. S/2001/540 • A/56/81), 4 June 2001 (U.N. Doc. S/2001/555 • A/56/85), 11 June 2001 (U.N. Doc. S/2001/580 • A/56/91), 13 June 2001 (U.N. Doc. S/2001/585 • A/56/92), 18 June 2001 (U.N. Doc. S/2001/604 • A/56/97), 19 June 2001 (U.N. Doc. S/2001/611 • A/56/98), 21 June 2001 (U.N. Doc. S/2001/619 • A/56/119), 2 July 2001 (U.N. Doc. S/2001/656 • A/56/131), 3 July 2001 (U.N. Doc. S/2001/662 • A/56/138), 13 July 2001 (U.N. Doc. S/2001/696 • A/56/184), 17 July 2001 (U.N. Doc. S/2001/706 • A/56/201), 26 July 2001 (U.N. Doc. S/2001/737 • A/56/223), 27 July 2001 (U.N. Doc. S/2001/743 • A/56/225), 6 August 2001 (U.N. Doc. S/2001/768 • A/56/272), 7 August 2001 (U.N. Doc. S/2001/770 • A/56/275), 9 August 2001 (U.N. Doc. S/2001/775 • A/56/280), 10 August 2001 (U.N. Doc. S/2001/780 • A/56/286), 14 August 2001 (U.N. Doc. S/2001/787 • A/56/294), 28 August 2001 (U.N. Doc. S/2001/825 • A/56/324), 30 August 2001 (U.N. Doc. S/2001/834 • A/56/325), 5 September 2001 (U.N. Doc. S/2001/840 •

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Political Affairs and to the United Nations High Commissioner on Human Rights.³⁰ In the year 2008 alone, Israel sent 29 letters to the U.N. Secretariat, regarding the increasing toll in Israel of Hamas' rocket and mortar attacks and other Palestinian violence and terrorism.³¹

53. These letters documented the escalation of rocket and mortar shell attacks launched from the Gaza Strip and targeting the civilian population in Southern Israel. Seeking to preserve the *Tahadiya* (lull) negotiated in June 2008 through Egyptian mediators, these letters repeatedly affirmed Israel's desire to find a non-violent solution in the face of this ongoing and intensifying terrorist activity. They also, however, referenced Israel's inherent right to defend itself and its citizens from such armed attacks, and stated that Israel would not indefinitely tolerate a situation where Israeli citizens became de facto hostages of a terrorist organisation. Israel repeatedly noted the persistence of terrorist attacks even after its disengagement from the Gaza Strip.
54. These letters were accompanied by numerous other diplomatic overtures, including through intermediaries, as well as public statements of Israeli officials and appeals by Israel's Ambassadors and representatives at the various U.N. bodies, primarily the Security Council. They were a clear indication of Israel's genuine will, not only to caution against the escalating situation, but also to exhaust all diplomatic channels prior to its realisation that it was necessary to launch a wide-ranging military operation in Gaza.

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

Doc. S/2006/502 • A/60/935), 10 October 2006 (U.N. Doc. S/2006/798 • A/61/507), 14 November 2006 (U.N. Doc. S/2006/887 • A/61/574), 15 November 2006 (U.N. Doc. S/2006/891 • A/61/578), 24 November 2006 (U.N. Doc. S/2006/916 • A/61/594), 5 December 2006 (U.N. Doc. S/2006/941 • A/61/608), 19 December 2006 (U.N. Doc. S/2006/1000 • A/61/647), 26 December 2006 (U.N. Doc. S/2006/1029 • A/61/681), 19 January 2007 (U.N. Doc. S/2007/23 • A/61/705), 7 February 2007 (U.N. Doc. S/2007/60 • A/61/729), 22 February 2007 (U.N. Doc. S/2007/101 • A/61/755), 7 March 2007 (U.N. Doc. S/2007/129 • A/61/787), 4 September 2007 (U.N. Doc. S/2007/524 • A/61/1038), 12 December 2007 (U.N. Doc. S/2007/728 • A/ES-10/406), 19 December 2007 (U.N. Doc. S/2007/750 • A/ES-10/407), 15 January 2008 (U.N. Doc. A/62/647-S/2008/24), 4 February 2008 (U.N. Doc. A/62/673 - S/2008/72), 8 February 2008 (U.N. Doc. A/62/685 - S/2008/86), 11 February 2008 (U.N. Doc. A/62/688 - S/2008/90), 27 February 2008 (U.N. Doc. A/62/710 - S/2008/132), 13 March 2008 (U.N. Doc. A/62/735 - S/2008/169), 27 March 2008 (U.N. Doc. A/62/770 - S/2008/209), 9 April 2008 (U.N. Doc. A/62/797 - S/2008/233), 18 April 2008 (U.N. Doc. S/2008/261), 22 April 2008 (U.N. Doc. A/62/812 - S/2008/269), 25 April 2008 (U.N. Doc. A/62/820 - S/2008/277), 9 May 2008 (U.N. Doc. A/62/839 - S/2008/311), 12 May 2008 (U.N. Doc. A/62/840 - S/2008/316), 14 May 2008 (U.N. Doc. A/62/843 - S/2008/328), 5 June 2008 (U.N. Doc. A/62/857 - S/2008/367), 24 June 2008 (U.N. Doc. S/2008/420), 22 December 2008 (U.N. Doc. S/2008/807), 24 December 2008 (U.N. Doc. S/2008/814).

³⁰ See, e.g., Letters of 13 March 2008, 18 December 2008, 29 December 2008.

³¹ See, e.g., Letters of 15 January 2008 (U.N. Doc. A/62/647-S/2008/24), 4 February 2008 (U.N. Doc. A/62/673 - S/2008/72), 8 February 2008 (U.N. Doc. A/62/685 - S/2008/86), 11 February 2008 (U.N. Doc. A/62/688 - S/2008/90), 27 February 2008 (U.N. Doc. A/62/710 - S/2008/132), 13 March 2008 (U.N. Doc. A/62/735 - S/2008/169), 27 March 2008 (U.N. Doc. A/62/770 - S/2008/209), 9 April 2008 (U.N. Doc. A/62/797 - S/2008/233), 18 April 2008 (U.N. Doc. S/2008/261), 22 April 2008 (U.N. Doc. A/62/812 - S/2008/269), 25 April 2008 (U.N. Doc. A/62/820 - S/2008/277), 9 May 2008 (U.N. Doc. A/62/839 - S/2008/311), 12 May 2008 (U.N. Doc. A/62/840 - S/2008/316), 14 May 2008 (U.N. Doc. A/62/843 - S/2008/328), 5 June 2008 (U.N. Doc. A/62/857 - S/2008/367), 24 June 2008 (U.N. Doc. S/2008/420), 22 December 2008 (U.N. Doc. S/2008/807), 24 December 2008 (U.N. Doc. S/2008/814).

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55. In withdrawing from the Gaza Strip in 2005, Israel sought to de-escalate the conflict, and advance prospects for coexistence. Hamas, however, rejected coexistence, proclaiming its unyielding hostility to peace and its commitment to violence.
56. On 25 June 2006, Palestinians terrorists from Gaza attacked an Israeli army post on the Israeli side of the southern Gaza Strip border after crossing into Israel through an underground tunnel near the Kerem Shalom border crossing. During the attack the terrorists killed two IDF soldiers, wounded four others and captured the Israeli soldier Corporal Gilad Shalit. Since his abduction more than three years ago, Shalit has been held by Hamas incommunicado in an undisclosed location. Other than a single audio tape with Shalit sending a message appealing for his release, no sign or indication regarding his condition was conveyed by Hamas. Furthermore, throughout this period, all representatives, including the ICRC, have been denied any access to Shalit.³² Appeals for his release made by other prominent members of the international community have also been rejected by Hamas.
57. In addition to its many diplomatic appeals to end Hamas' attacks on Israel, Israel joined several members of the international community in instituting economic sanctions against Hamas, while at the same time endeavouring to supply the Palestinian population with humanitarian relief.³³ Canada, the European Union, and the United States all designated Hamas as a terrorist organisation for purposes of sanctions, and Australia has so designated Hamas' military wing, the Izz al-Din al-Qassam Brigades.³⁴
58. Neither Israel's diplomatic overtures, nor its pleas to the international community, nor sanctions imposed by numerous States, were able to stop the rocket attacks.

³² News Release, *Gaza: ICRC urges Hamas to allow captured Israeli soldier Gilad Shalit regular contact with his family*, ICRC, 18 June 2009, available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/palestine-news-180609?opendocument>.

³³ For the legal analysis of these measures, see *Jaber Al-Bassiouni v. The Prime Minister of Israel*, HCJ 9132/07 (30 January 2008).

³⁴ See Currently listed entities, Public Safety Canada, available at <http://www.publicsafety.gc.ca/prg/ns/le/cle-en.asp> (Canada); Anton La Guardia, *Hamas is added to EU's blacklist of terror*, Telegraph, 12 September 2003, available at <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/1441311/Hamas-is-added-to-EUs-blacklist-of-terror.html> and *EU blacklists Hamas political wing*, BBC News, 11 September 2003, available at http://news.bbc.co.uk/2/hi/middle_east/3100518.stm (the European Union); Country Reports on Terrorism 2005, United States Department of State, April 2006, at ¶¶ 132-136 and 183, available at <http://www.state.gov/documents/organization/65462.pdf> and *U.S. Welcomes European Union Designation of Hamas as Terrorists*, United States Department of State, 6 September 2003, available at <http://www.america.gov/st/washfile-english/2003/September/20030906173844ynnedd0.1619074.html> (the United States); and Listing of Terrorist Organisations, Australian National Security, available at <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument> (Australia).

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59. Hamas obtained military supplies through a vast network of tunnels and clandestine arms shipments from Iran and Syria. During this period in which Israel sought a diplomatic solution, the terrorist organisations in the Gaza Strip, with Hamas at the forefront, worked intensively to enlarge and upgrade their military capabilities and infrastructure.³⁵ These organisations abused the *Tahadiya* to smuggle in vast quantities of weapons through tunnels running under the border with Egypt.³⁶ They accelerated and enhanced their training, enlarged their underground network of tunnels used for smuggling and enabling terrorist attacks, acquired advanced weaponry, developed weapons of their own, and increased the range and lethality of their rockets.
60. On Friday, 19 December 2008, Hamas unilaterally announced the end of the *Tahadiya*, launching dozens of Qassam and longer-range Grad rockets against Israeli population centres. On 24 December 2008, the U.N. Secretary-General strongly condemned Hamas' actions and warned of further harm to civilians if the attacks did not cease immediately.³⁷ On that same day, 24 December 2008, thirty more rockets were launched into Israel.³⁸ Hamas' actions forced the residents of Southern Israel to resume a life of fear, with no sign that the attacks would abate and every indication they were intensifying. Some residents with the means to do so fled their homes for the relative safety of locations further north. Other civilians could not afford to leave, and led most of their daily life in underground shelters. Schools were often closed, as were many workplaces.
61. Hamas persisted in launching its rockets and mortar rounds at Israel. And, once the IDF began the Gaza Operation, Hamas stepped up its bombardment of Israeli towns even further, vowing that it would not stop shelling Israeli civilians. During this time alone, Hamas hit 101 of the 200 Israeli towns and villages in rocket range with a total of 617 rockets and 178 mortar shells. These included:

³⁵ See Intelligence and Terrorism Information Center, Exploitation of the 'Lull' by Hamas to Re-Arm, 21 August 2008, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e003.pdf.

³⁶ See Intelligence and Terrorism Information Center, Weapons-smuggling tunnels in Gaza, 28 October 2008, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/ct_e009.pdf.

³⁷ The Secretary-General of the United Nations issued the following statement on 24 December 2008:

The Secretary-General is gravely concerned about the situation in Gaza and southern Israel and the potential for further violence and civilian suffering if calm is not restored. He condemns today's rocket attacks on southern Israel and calls on Hamas to ensure that rocket attacks from Gaza cease immediately.

See "New York, 24 December 2008 - Statement attributable to the Spokesperson for the Secretary-General on the Situation in Gaza and southern Israel," available at <http://www.un.org/apps/sg/sgstats.asp?nid=3631>.

³⁸ See Intelligence and Terrorism Information Center, Summary of Rocket Fire and Mortar Shelling in 2008, 1 January 2009, at 9, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/ipc_e007.pdf.

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- 25 towns within 7 kilometres of the Gaza Strip border – most rockets in this range hit the town of Sderot (19,400 residents) and the Kibbutzim A'lumin, Gevim and Mefalsim.
 - 44 towns within 7-20 kilometres of the Gaza Strip border – most rockets in this range hit the towns of Ashkelon (110,000 residents) and Netivot (26,100 residents).
 - 32 towns more than 20 kilometres from the Gaza Strip border – most rockets in this range hit the towns of Be'er Sheva (over 185,000 residents) and Ashdod (210,000 residents –the 5th largest city in the State of Israel).
 - Other major towns that suffered rockets attacks during the operation were Kiryat Gat (47,900 residents), Rahat (43,300 residents), Yavne (32,300 residents), Ofakim (24,700 residents) and Kiryat Malachi (19,700 residents). Schools in the affected areas remained closed through most of the Gaza Operation.
62. On 27 December 2008, one of the longer-range Grad rockets killed 58-year-old Beber Vaknin of Netivot.³⁹ Two days later, two civilians going about their day were killed by similar rockets.⁴⁰ On 30 December 2008, a Hamas rocket landed in a kindergarten classroom in Be'er Sheva, one of Israel's main cities, luckily causing no injuries because it fell late in the day after the children had left.⁴¹ In total, during the Gaza Operation, close to 800 rockets and mortar rounds landed on Israeli territory, killing 4 civilians, injuring 182 others, and terrorising nearly a million civilians, both Jews and Arabs, who were forced to flee beyond the range of the rockets or else to live their lives within the range of Hamas rocket attacks.
63. Hamas attacks were often so indiscriminate that they even inflicted casualties on the Palestinian population. In the month of December 2008 alone, the following examples were reported:

³⁹ See Press Release, *Victims of Palestinian Violence and Terrorism since September 2000*, Israel Ministry of Foreign Affairs, available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Victims+of+Palestinian+Violence+and+Terrorism+sinc.htm>.

⁴⁰ *Id.*

⁴¹ Israel Ministry of Foreign Affairs Press Release, *Behind the Headlines: Hamas increases range of rocket fire*, 31 December 2008, available at http://www.mfa.gov.il/MFA/About+the+Ministry/Behind+the+Headlines/Hamas_increases_range_rocket_fire_31-Dec-2008.

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- On 6 December 2008, four rockets fired at the Kerem Shalom crossing fell on the Rafah Crossing with Egypt;⁴²
 - On 20 December 2008, two five-year-old Palestinian children in Beit Hanoun were wounded by the explosion of a rocket that fell in the Gaza Strip;⁴³
 - On 24 December 2008, a rocket fell on the house of Imad al-Drimli in the Tel al- Hawa district of Gaza City;⁴⁴
 - On 26 December 2008, an explosion in Beit Hanoun killed two girls, aged 5 and 13, and wounded a Palestinian man;⁴⁵
 - Between 27 and 31 December 2008, the first five days of Israel's air offensive, about 6.5 percent of the rockets fired by Hamas at Israel fell in the Gaza Strip.
64. None of these casualties can be attributed to Israeli action. Instead, they serve to demonstrate the wholly indiscriminate nature of Hamas' attacks and total disregard of human lives, including the Palestinian population under their control.
65. Furthermore, rocket fire aimed at Israel also damaged U.N. humanitarian installations inside Gaza. For instance, according to a U.N. investigation into damage to U.N. property during the Gaza Operation:
- “In the case of the WPF Karni Warehouse, the Board concluded that the most serious damage sustained was caused by a rocket fired by a Palestinian faction, most likely Hamas, which was intended to strike in Israel, but which fell short.”⁴⁶
66. In sum, the rocket attacks launched by Hamas and other terrorist organisations from the Gaza Strip against Israel inflicted deliberate and intimidating damage on both sides of the Gaza border. Aside from the physical injuries and the deaths those attacks caused,

⁴² Intelligence and Terrorism Information Center, Hamas Exploitation of Civilians as Human Shields, January 2009 ¶96, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e028.pdf.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ U.N. General Assembly, *Letter dated 4 May 2009 from the Secretary-General addressed to the President of the Security Council : Summary by the Secretary-General of the report of the United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip between 27 December 2008 and 19 Jan 2009* (hereafter “U.N. BoI Report”), 15 May 2009, A/63/855-S/2009/250, at ¶ 89, available at <http://www.unhcr.org/refworld/docid/4a292c8dd.html>.

hundreds of thousands of Israeli civilians have been forced to live in a permanent state of fear from a daily barrage of rockets threatening their homes, schools and hospitals. While Hamas' rockets did not always hit their intended targets, they achieved their terrorist objective of causing indiscriminate destruction, sparing nothing and no one within their range.

C. Israel's Right and Obligation to Defend Itself and Its Citizens from Attack

67. In these circumstances, there is no question that Israel was legally justified in resorting to the use of force against Hamas. As explained above, this resort to force occurred in the context of an ongoing armed conflict between a highly organised, well-armed, and determined group of terrorists and the State of Israel. The Gaza Operation was simply the latest in a series of armed confrontations precipitated by the attacks perpetrated without distinction against all Israeli citizens by Hamas and its terrorist allies. In fact, over the course of this conflict, Israel conducted a number of military operations in the West Bank and the Gaza Strip, to halt terrorist attacks.
68. Even apart from the eight years of ongoing armed conflict, which justified Israel's resort to force both previously and during the Gaza Operation, Hamas' intensified armed attacks on Israel and its citizens during 2008 independently justified Israel's response to defend its citizens. All States have the inherent right to defend themselves against armed attacks. This right is recognised by customary international law, and is further confirmed in Article 51 of the United Nations Charter.⁴⁷
69. A State's right of self-defence extends beyond attacks by other States.⁴⁸ Even before the U.N. Charter, customary international law recognised the right of self-defence against non-

⁴⁷ U.N. Charter, art. 51 (confirming "the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security").

⁴⁸ See, e.g., Christopher Greenwood, *Terrorism: The Proper Law and the Proper Forum*, in 79 INTERNATIONAL LAW AND THE WAR ON TERROR 353, 355 (Fred L. Borch & Paul S. Wilson eds., 2003) ("Nothing in the text or the drafting history of the Charter suggests that 'armed attack' is confined to the acts of states . . . Nor has state practice or the jurisprudence of international tribunals since the adoption of the Charter espoused a formalistic distinction between acts of states and acts of terrorist and other groups in determining what constitutes an armed attack."); Thomas M. Franck, *Terrorism and the Right of Self-defence*, 95 AM. J. INT'L L. 839, 840 (2001) (declaring it "inconceivable" that States should not be allowed to exercise the same right of self-defence against non-State actors as they would have against other States); see also Chatham House, "Principles of International Law on the Use of Force by States in Self-Defence," International Law Programme, ILP WP 05/01, at 2, 11-13 (2005) (hereafter "Chatham House Principles") (conclusion by a group of prominent experts that Article 51 "applies also to attacks by non-state actors," provided such attacks are "large scale" and that the State hosting the attacking actors is "unable or unwilling to deal with the non-state actors itself"). See also Institut de Droit International, 10A resolution (Tenth Commission), Present Problems of the Use of Armed Force in International Law - Self Defence, 27 October 2007.

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State actors, such as armed groups launching attacks of significant scale and scope.⁴⁹ The United Nations Security Council invoked the right of self-defence in the wake of the September 11 attacks on the United States, calling upon the international community to combat such terrorism perpetrated by non-State actors.⁵⁰ When organised groups rather than standing armies launch attacks against a State, they trigger a State's right to self-defence if "such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces."⁵¹

70. There is no question that Israel faced an "armed attack" within the meaning of customary international law or Article 51 of the U.N. Charter, and has the right to use force against Hamas in self-defence.⁵²
71. Israel's overall use of force against Hamas during the Gaza Operation was also proportional to the threat posed by Hamas. International law "does not require a defender to limit itself to actions that merely repel an attack; a state may use force in self-defence to remove a continuing threat to future security."⁵³ Under the customary international law principle of proportionality, a state may use defensive measures necessary to avert on-going attacks or preserve security against further similar attacks.⁵⁴ This assessment focuses on "the scale of the whole operation,"⁵⁵ not specific incidents of targeting.

⁴⁹ See, e.g., Letter from Daniel Webster to Lord Ashburton (6 August 1842), *quoted in* 2 John Bassett Moore, A DIGEST OF INTERNATIONAL LAW 412 (1906) (providing guidelines for customary international law on the use of force in self-defence, in the context of defence against a non-State actor).

⁵⁰ United Nations Security Council Resolution 1368 (12 September 2001) (recognizing "the inherent right of individual or collective self-defence," in connection with "threats to international peace and security caused by terrorist acts"); United Nations Security Council Resolution 1373 (28 September 2001) (noting that "international terrorism constitute[s] a threat to international peace and security" while "*reaffirming* the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368") (emphasis added).

⁵¹ Bruno Simma, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, vol. I, at 800 (3d ed. 2002).

⁵² In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion, I.C.J. reports 2004, at 136), the International Court of Justice, asserted, *ipse dixit*, and without any persuasive rationale, that the attacks launched by Palestinian terrorist organisations against Israel could not qualify as an armed attack under Article 51 of the U.N. Charter. This unsubstantiated assertion in the Advisory Opinion has met with widespread criticism from academic commentators and indeed from other judges of the court. See separate opinion of Judge Higgins, at 15 (¶ 33); declaration of Judge Buergenthal, at 242 (¶ 6); separate opinion of Judge Kooijmans, at 229-230 (¶ 35); see also S. D. Murphy, "Self-Defense and the Israeli Wall Advisory Opinion: An *Ipse Dixit* from the ICJ?," 99 AJIL 62 62-63 (2005),

⁵³ Sean Murphy, PRINCIPLES OF INTERNATIONAL LAW 447 (2006).

⁵⁴ Rosalyn Higgins, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT, at 232 (1995) (stating the proportionality of military action "cannot be in relation to any specific prior injury — it has to be in relation to the overall legitimate objective, of ending the aggression"); see also Chatham House Principles at 10. Judge Christopher Greenwood has confirmed that the law does *not* mandate that "the degree of force employed in self-defence must be no greater than that used in the original armed attack." Christopher Greenwood, Essays on War in International Law 80 (2006). The late Judge Roberto Ago likewise wrote that "[i]t would be mistaken . . . to think that there must be proportionality between the conduct constituting the armed attack and the opposing conduct. The action needed to

[FOOTNOTE CONTINUED ON NEXT PAGE]

72. In conclusion, the Gaza Operation was justified as an act of self-defence in response to Hamas' escalating rocket and mortar attacks against Israel during 2008. In any case, Israel's right to use force against Hamas was triggered years ago, when Palestinian terrorist organisations, including Hamas, initiated the armed conflict which is still ongoing. The current operation was another regrettable stage in this conflict.

D. Hamas' Military Capabilities in Gaza

73. Hamas' military capabilities necessarily defined the challenges Israel faced in its efforts to stop Hamas' attacks, and they explained the types of force Israel used in its targeted three-week operation in Gaza.⁵⁶
74. Since violently seizing power in the Gaza Strip, Hamas' leadership in Gaza has operated through a "political bureau" which in turn directs the movement's military wing, the Izz al-Din al-Qassam Brigades, and the internal security forces. The Hamas leadership has accelerated the military build-up of both these armed forces in preparation for a military confrontation with the IDF. As of December 2008, there were more than 20,000 armed operatives, directly subordinate to the Hamas military wing or designated to be integrated into its forces during an emergency. In addition to Hamas, Israel faced a sizeable military force of several thousand operatives from terrorist organisations such as the Palestinian Islamic Jihad, the Popular Resistance Committees, Fatah/Al-Aqsa Martyrs Brigades groups and the Army of Islam.
75. Hamas has organised its forces into semi-military formations throughout the Gaza Strip and deployed them in territorial brigades and designated units. Each territorial brigade has more than 1,000 operatives divided into battalions. They regularly conduct large-scale training operations in the Gaza Strip and also train in Iran and Syria. These forces have received advanced weaponry, upgraded rockets and advanced anti-tank weapons. They prepared for attacks to be mounted against the IDF, including any attempt by Israel to quell the rocket attacks, by constructing underground systems for fighting and concealment throughout the Gaza Strip, developing powerful Improvised Explosive Devices ("IEDs") and placing them on or near locations where IDF activities were anticipated.

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halt and repulse the attack may well have to assume dimensions disproportionate to those of the attack suffered."(*Id.* (quoting Judge Ago).

⁵⁵ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Rep. 2003, ¶ 77.

⁵⁶ For a detailed account of Hamas military capabilities and buildup, see Intelligence and Terrorism Information Center, *Hamas' military buildup in the Gaza Strip*, April 2008, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_080408.pdf.

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76. Hamas continued to expand the vast underground network of tunnels running through the Gaza Strip, not only to serve as smuggling routes, but also to facilitate attacks on IDF forces operating in the Gaza Strip. The tunnels were also designed to neutralise some of the IDF's capability to damage the Hamas military infrastructure and to give Hamas' armed forces an operational shield during prolonged, extensive fighting. Additionally, Hamas designated tunnels for terrorist attacks against IDF posts and villages near the border fence. It dug others as bait for IDF forces. In an interview with Al-Hayat on 17 December 2007, Abu Obeida, the spokesman for Hamas' Izz al-Din al-Qassam Brigades, said:

“Our defence plan is based, to a great extent, on rockets which have not yet been used and on a network of ditches and tunnels dug under a large area of the [Gaza] Strip. The [Israeli] army will be surprised when it sees fighters coming up out of the ground and engaging it with unexpected equipment and weapons...”⁵⁷

77. Hamas' military capabilities in 2008 included both its armed forces and its internal security forces. The armed forces in the military-terrorist wing (the Izz al-Din al-Qassam Brigades) included more than 15,000 operatives, according to Hamas' own claims.⁵⁸ In the event of an escalation in the conflict with Israel, Hamas designated the internal security forces to join the armed resistance against the IDF. In the initial stages, they were to provide primarily logistical and intelligence support. In broader and lengthier hostilities, such as occurred between December 2008 and January 2009, the internal security forces were to supplement the fighting units of the Izz al-Din al-Qassam Brigades and confront the IDF, even at the expense of weakening their capabilities to deal with internal security matters. Many Hamas operatives played a dual role by joining both the internal security forces and the Izz al-Din al-Qassam Brigades.⁵⁹
78. In December 2008, Hamas' internal security forces included more than 13,000 operatives, many of them also members of the Izz al-Din al-Qassam Brigades, as detailed further below. These forces are divided into five primary forces: the “Police” (formerly the Executive Force, which also includes the elite unit, the Rapid Intervention Force, and the

⁵⁷ *Id.*

⁵⁸ Marie Colvin, *Hamas Wages Iran's Proxy War on Israel*, The London Sunday Times, 9 March 2008, available at http://www.timesonline.co.uk/tol/news/world/middle_east/article3512014.ece (reporting interview with a senior Hamas terrorist operative, who stated that the Izz al-Din al-Qassam Brigades had 15,000 operatives).

⁵⁹ For detailed analysis, see Intelligence and Terrorism Information Center, *Mounting evidence indicates that during Operation Cast Lead (and in ordinary times) members of Hamas' internal security forces served as commanders and operatives in Hamas' military wing*, 24 March 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e067.htm. See also legal analysis at V.C(3)(b).

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Naval Police); the Internal Security Service; the Security and Protection Force; the National Security and the Civil Defence Service.

79. The core of Hamas' internal security forces is the "Police," which in 2008 included more than 6,000 members armed with Kalashnikov or M-16 assault rifles, hand grenades and anti-tank weapons. The Naval Police included hundreds of operatives carrying light arms and various IEDs and was involved in shooting at Israel Navy patrol boats. The Internal Security Service, also numbering in the hundreds of operatives, was responsible for dealing with suspected collaborators, gathering information on individuals suspected of anti-Hamas activities, torturing and interrogating detainees. The Security and Protection Force was responsible for guarding important Hamas individuals and institutions, while the National Security Service, with a membership of several hundred, was deployed mainly along the Philadelphi route⁶⁰ and responsible for border security and control of smuggling.
80. These various forces were heavily armed. Before the Gaza Operation began in December 2008, Hamas had amassed substantial stockpiles of weapons and munitions, most smuggled into Gaza through tunnels under the border with Egypt and some independently produced or obtained after Hamas took over the security forces of the Palestinian Authority in June 2007. Hamas weapons capabilities included foreign manufactured rockets (122mm artillery rockets with the range of 20km [Grad] and 40 km); locally made rockets (Qassam series); mortars, both imported and locally made; anti-tank weapons; locally manufactured IEDs; foreign manufactured mines; machine guns, automatic rifles; anti-aircraft weapons; night vision equipment; listening equipment for intelligence gathering; advanced communications equipment; and huge quantities of ammunition.
81. The extent of this arms build-up by Hamas is indisputable. Hamas itself has displayed its weaponry on television and the Internet, including (for example) the following photographs of anti-aircraft weaponry:

⁶⁰ Philadelphi is the term commonly used to describe the security route along the border between Gaza and Egypt.

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- ▶ Anti-aircraft weapons in the hands of Hamas. Left: Picture posted by the Izz al-Din al-Qassam Brigades' information department on YouTube (6 December 2007); Right: Image of an anti-aircraft machine gun in the hands of a Hamas operative (Source: Al-Aqsa TV, 24 December 2007)



- ▶ PA weapons seized by Hamas: 14.5mm anti-aircraft machine guns (Source: Al-Aqsa TV, 24 December 2007)



- ▶ Left: Photo of 14.5mm anti-aircraft machinegun, posted by the Izz al-Din al-Qassam Brigades on YouTube (11 January 2008); Right: 14.5mm anti-aircraft machinegun hidden under a green net (Source: Al-Aqsa TV, 24 December 2007)

82. Hamas' military build-up crucially increased the urgency of Israeli action to stop the attacks.

E. Stages of the Operation

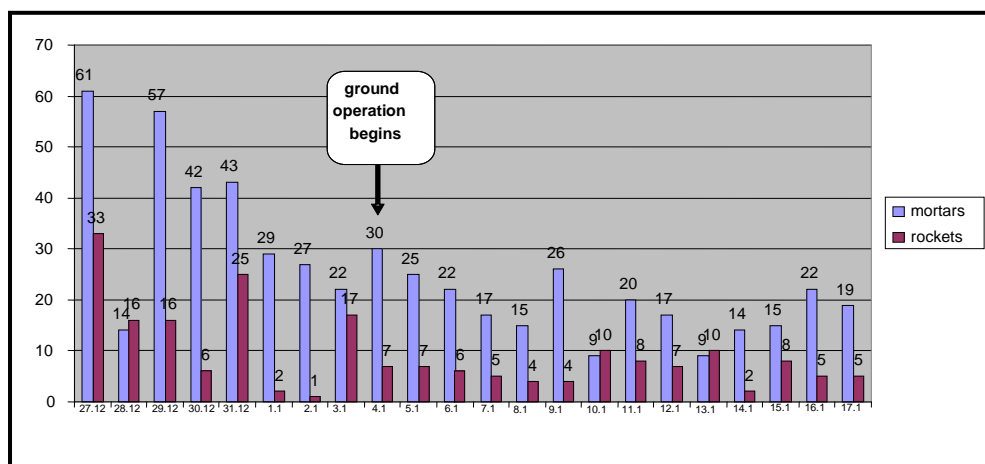
83. On 27 December 2008, after exhausting other alternatives and after issuing warnings that Israel would attack if the rocket and mortar assault from Gaza did not stop, the IDF launched a military operation against Hamas and other terrorist organisations in the Gaza Strip. The Operation was limited to what the IDF believed necessary to accomplish its objectives: to stop the bombardment of Israeli civilians by destroying and damaging the mortar and rocket launching apparatus and its supporting infrastructure, and to improve the safety and security of Southern Israel and its residents by reducing the ability of Hamas and other terrorist organisations in Gaza to carry out future attacks.⁶¹ The Gaza Operation did not aim to re-establish an Israeli presence in the Gaza Strip.
84. The Gaza Operation commenced with aerial operations on 27 December 2008. These focused on Hamas terrorist infrastructure, as well as rocket and mortar launching units. The Israel Air Force (“IAF”) targeted military objectives, including the headquarters from which Hamas planned and initiated operations against Israel, command posts, training camps and weapons stores used in the planning, preparation, guidance and execution of terrorist attacks. In carrying out its strikes, IAF used sophisticated precision weapons to minimise the harm to civilians, given Hamas’ practice of basing their operations in densely populated areas. As described further in Section V.C(4) below, the extensive precautions adopted by Israel to protect civilians during this conflict — often at the expense of military advantage and at the risk of Israeli soldiers — sought to meet the most demanding standards of modern military operations.
85. On 3 January 2009, one week into the Gaza Operation and facing the continued rocket and mortar attacks on Israeli civilians, the IDF commenced a ground manoeuvre. Despite initial reluctance, a ground manoeuvre was necessary because, despite the Israeli aerial attacks, Hamas refused to stop firing on Israeli localities. Moreover, continued reliance on aerial strikes alone — in light of Hamas’ tactic of taking cover within the densely populated areas of Gaza — would have likely resulted in significant numbers of Palestinian civilian casualties. Ground forces entered the Gaza Strip with naval and air support. The objectives of this manoeuvre included undermining Hamas’ terrorist infrastructure, taking control of rocket and mortar launching sites and reducing the number of attacks on Israeli territory. The IDF expanded the ground manoeuvre on 10 January

⁶¹ This broader objective is no different than the objective that NATO articulated for using force in the former Yugoslavia, which was to “[d]amage Serbia’s capacity to wage war against Kosovo in the future or spread the war to neighbors by diminishing or degrading its ability to wage military operations.” NATO Bombings, Final Report to the ICTY Prosecutor, ¶ 45 (quoting the Cohen, Shelton Joint Statement on Kosovo).

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2009, entering deeper into the Gaza Strip, with the objective of dismantling terrorist infrastructure and taking control of rocket launching sites in the heart of the urban areas.

86. The Gaza Operation ended on 17 January 2009 (after 22 days in all) with Israel's implementation of a unilateral ceasefire. Subsequently, IDF troops began their withdrawal from the Gaza Strip, which they completed on 21 January 2009 in accordance with Security Council Resolution 1860.⁶² Since then, and even during the Gaza Operation itself, Israel has sought to provide and facilitate humanitarian assistance to Palestinians of the Gaza Strip.
87. The Gaza Operation was demonstrably effective in achieving its military objectives. As the chart below demonstrates, the level of rocket and mortar attacks on Israeli towns decreased significantly even during the three weeks of the Gaza Operation:

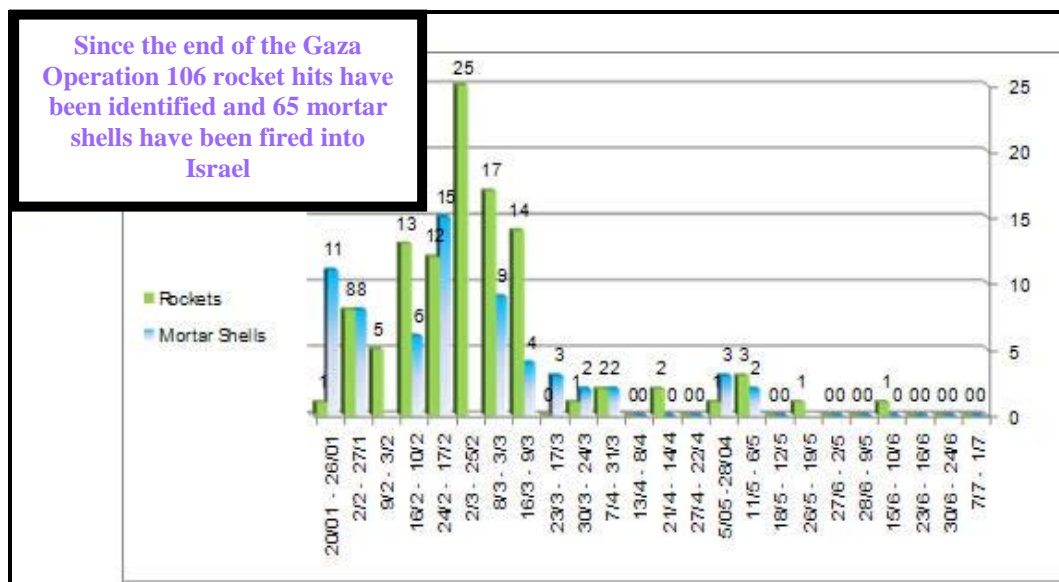


► Rocket and mortar shells fired at Israel during the Gaza Operation between 27 December 2008 and 17 January 2009

⁶² Resolution 1860 was adopted by the Security Council on 8 January 2009 and called – *inter alia* – upon Member States to intensify efforts to provide arrangements and guarantees in Gaza in order to sustain a durable ceasefire and calm, including to prevent illicit trafficking in arms and ammunition and to ensure the sustained reopening of the crossing points.

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88. Since the end of the Gaza Operation, rocket and mortar attacks have continued to be lower than before the Operation, as illustrated below:



- Rocket and mortar shells fired at Israel since the end of the Gaza Operation

V. THE USE OF FORCE

A. The Legal Framework

89. Even where resort to force is justified, as it was for Israel in responding to heightened attacks by Hamas in the course of its long-standing armed conflict with Israel, customary law limits the *manner* in which a State can exercise force (*jus in bello*). The two critical aspects of this limitation — the principle of distinction and the principle of proportionality — are both designed to protect civilians not taking direct part in the hostilities and civilian objects, while taking into account the military necessities and the exigencies of the situation.
90. The fact of civilian casualties in an armed conflict, even in significant numbers, does not in and of itself establish any violation of international law. In fact, the doctrine of “proportionality operates in scenarios in which incidental injury and collateral damage are the *foreseeable*, albeit undesired, result of attack on a legitimate target.”⁶³ As Kenneth Watkin, the Canadian Judge Advocate General, has explained, “although civilians are not to be directly made the object of an attack, humanitarian law accepts that they may be killed or civilian property may be damaged as a result of an attack on a military objective.”⁶⁴
91. It is for this very reason that the Office of the Prosecutor, at the International Criminal Tribunal for the former Yugoslavia, rejected any suggestion, in its evaluation of the NATO bombing campaign in Yugoslavia, that the mere fact of civilian harm was indicative of wrongdoing. As the Committee Established to Review the 1999 NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated in 2000 to the Prosecutor of the ICTY, “[m]uch of the material submitted to the OTP consisted of reports that civilians had been killed, often inviting the conclusion to be drawn that crimes had therefore been committed.” Yet as the Prosecutor’s Committee noted, “[c]ollateral casualties to civilians and collateral damage to civilian objects can occur for a variety of reasons.”⁶⁵ For example, they may be harmed due to their proximity to a military target, or by operational mistakes. At times civilians may suffer harm because they are conscripted by the adversary to serve as “human shields” against an attack upon a military target.

⁶³ Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS & DEV. L.J. 143, 150 (1999) (emphasis added).

⁶⁴ Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, in YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 9 (Timothy L.H. McCormack ed., 2005).

⁶⁵ NATO Bombings, Final Report to the ICTY Prosecutor, ¶ 51.

92. In those and similar situations, one cannot jump from the unfortunate occurrence of civilian harm to the unfounded conclusion that the attacks were illegal. The critical but often omitted link in determining the legality of an attack — even an attack that results in death or injury to civilians — is whether the attacking forces sought to observe the rules of the Law of Armed Conflict, and in particular the principles of distinction and proportionality. This analysis depends on the particular facts of each incident. When individual attacks are legitimate, “the mere cumulation” of such instances, all of which are deemed to have been lawful, “cannot *ipso facto* be said to amount to a crime.”⁶⁶
93. For this reason, and as discussed in detail below, any assessment of the legality of particular conduct cannot focus only on the consequences (whether civilians were harmed). Instead, the proper focus is on whether the persons carrying out the attack, based on what they knew and the conditions they faced at the time, complied with the applicable rules of international law. The IDF made extensive efforts to comply, not only in its training and rules of engagement but also as implemented regularly in the field. Hamas made no attempt to comply with these principles, but has exploited these rules in an attempt to gain military advantage from the constraints the rules imposed on IDF activities.

(1) The Principle of Distinction

94. The first core principle of the Law of Armed Conflict, as reflected both in treaty law and in customary international law, is that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”⁶⁷ The principle imposes obligations on both parties to an armed conflict.

(a) The Obligation Not to Target the Adversary’s Civilians

95. It is unlawful to deliberately make civilians the object of attack. As the customary international law principle is reflected in Additional Protocol I, “[t]he civilian population as such, as well as individual civilians, shall not be the *object* of attack. Acts or threats of

⁶⁶ *Id.* ¶ 52.

⁶⁷ Additional Protocol I, art. 48. Although the State of Israel is not a party to the Additional Protocols to the Geneva Conventions, it accepts that this provision, as with certain others addressing the principles of distinction and proportionality, accurately reflects customary international law. See *Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02 at ¶ 20 (11 December 2005).

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violence the primary *purpose* of which is to spread terror among the civilian population are prohibited.”⁶⁸ Rather, “[a]ttacks shall be limited strictly to military objectives.”⁶⁹

96. It is important to make clear what this principle does *not* require. First, by definition, the principle of distinction does not forbid the targeting of combatants, nor the targeting of civilians who take a direct part in the hostilities.⁷⁰
97. Second, this principle addresses only deliberate targeting of civilians, not incidental harm to civilians in the course of striking at legitimate military objectives. This understanding of customary international law was made explicit by numerous States in their ratifications of Additional Protocol I,⁷¹ and many other States have officially adopted this interpretation.⁷²
98. Direct participation in hostilities has been interpreted by Israel’s High Court of Justice as involving all persons that perform the function of combatants, including “a civilian bearing arms (openly or concealed) who is on his way to the place where he will use them against the army, at such place, or on his way back from it,” as well as “a person who collected intelligence on the army, whether on issues regarding the hostilities . . . or beyond those issues . . . ; a person who transports unlawful combatants to or from the place where the hostilities are taking place; a person who operates weapons which unlawful combatants use, or supervises their operation, or provides service to them, be the distance from the battlefield as it may.”⁷³

⁶⁸ Additional Protocol I, art. 51(2) (emphasis added).

⁶⁹ Additional Protocol I, art. 52(2).

⁷⁰ International Committee of the Red Cross, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, Vol. I: Rules at 11 (Jean-Marie Henckaerts and Louise Doswald-Beck, eds., 2005) (hereafter “ICRC CIL Study, Rules”), Rules 1 and 7. Like many other States, Israel does not agree that all of the “rules” stated in the ICRC CIL Study reflect customary international law, but it does agree that it accurately states the principle of distinction. *See generally* Daniel Bethlehem, *The Methodological Framework of the Study*, in Elizabeth Wilmshurst and Susan Breau, *PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (Cambridge University Press 2007), at 3-14. W. Hays Parks, *The ICRC Customary Law Study: A Preliminary Assessment*, 99 Am. Soc’y Int’l L. Proc. 208, 212 (2005) (arriving at the “preliminary conclusion that [the study] is not an impartial analysis of the law but rather a compilation of statements . . . it lacks context, a filtration process, and battlefield state practice”). *See also* Charles Garraway, “The Use and Abuse of Military Manuals,” 7 Yearbook of International Humanitarian Law, at 425-440 (Timothy L.C. McCormack ed.) (T.M.C. Asser Institute, The Hague, Netherlands 2004).

⁷¹ For example, Australia, Canada, France, Italy, New Zealand and the United Kingdom all expressly stated upon ratification that Article 52(2) of Additional Protocol I was neither intended to address, nor did it address, the question of incidental or collateral damage resulting from an attack directed at a military objective. *See* International Committee of the Red Cross, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, Vol. II: Practice, (Jean-Marie Henckaerts and Louise Doswald-Beck, eds., 2005) (hereinafter “ICRC CIL Study, Practice”), Ch.1, ¶¶ 86-91.

⁷² *See* ICRC CIL Study, Practice, Ch. 1, ¶¶ 143, 147, 149 (noting also statements by Germany, the Netherlands, and the United States to this effect).

⁷³ *See Public Committee against Torture in Israel v. Government of Israel*, HCJ 769/02 at ¶¶ 34-35 (11 December 2005).

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99. Fourth, more broadly, the presence of *civilians at a site* (whether voluntarily or involuntarily) does not by itself forbid an attack on an otherwise legitimate military target. As explained in Oppenheim's *INTERNATIONAL LAW*, civilians "do not enjoy absolute immunity. Their presence will not render military objects immune from attack for the mere reason that it is impossible to bombard [the military objects] without indirectly causing injury to the non-combatants."⁷⁴ The military manuals of numerous countries echo this point.⁷⁵ So do leading commentators, such as W. Hays Park, who has written that:

"Within both the Just War Tradition and the law of war, it has always been permissible to attack combatants even though some noncombatants may be injured or killed; so long as injury to noncombatants is ancillary (indirect and unintentional) to the attack of an otherwise lawful target, the principle of noncombatant immunity is met."⁷⁶

100. The expected presence of *civilians*, though, does impact the analysis of the proportionality of an attack, discussed in Section V.A(2) below.
101. The determination of what is a lawful "military objective" turns on an assessment of "military advantage." Additional Protocol I reflects customary international law in defining "military objectives" as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage."⁷⁷ The tactics and strategy of the opposing force can transform sites that may once have been purely civilian into legitimate military objectives. As the ICRC Commentary to Additional Protocol I explains,

"In combat areas it often happens that purely civilian buildings or installations are occupied or used by the armed forces and such objectives may be attacked, provided that this does not result in excessive losses among the civilian population. For example, it is clear that if fighting between armed forces takes place in a town which is defended house by house, these buildings — for which Article 52 (General protection of civilian objects), paragraph 3, lays down a presumption regarding their civilian use — will inevitably become military objectives because they

⁷⁴ Lassa Oppenheim, *II INTERNATIONAL LAW: Disputes, War and Neutrality* 525 (7th ed. 1952).

⁷⁵ See, e.g., ICRC CIL Study, Practice, Ch. 2, ¶ 635 (quoting Australia's Defence Force Manual as providing that "[t]he presence of noncombatants in or around a military objective does not change its nature as a military objective. Noncombatants in the vicinity of a military objective must share the danger to which the military objective is exposed."). Some of the manuals cited in the ICRC study were not necessarily formal military manuals in a classic sense, but rather training manuals.

⁷⁶ W. Hays Parks, *AIR WAR AND THE LAW OF WAR*, 32 A.F. L. Rev. 1, 4 (1990).

⁷⁷ Additional Protocol I, art. 52(2).

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offer a definite contribution to the military action. However, this is still subject to the prohibition of an attack causing excessive civilian losses.”⁷⁸

102. Judging military advantage with respect to a target evaluated during combat is not an exercise in hindsight. The perspective is that of the commander in the field at the time of a targeting decision, with the information then available.⁷⁹
103. This point, too, is reflected in military manuals of many States. Thus, for example, the Military Manual of the Netherlands explains that:

“the definition of ‘military objectives’ implies that it depends on the circumstances of the moment whether an object is a military objective. The definition leaves the necessary freedom of judgement to the commander on the spot.”⁸⁰

104. The military manuals of other States likewise afford a margin of discretion to the commander in the field.⁸¹
105. The military manuals of many States also confirm that the relevant “military advantage” defining a “military objective” relates to “the military campaign or operation of which the attack is a part considered *as a whole* and not only from isolated or particular parts of that campaign or operation.”⁸² Further, the “security of the attacking forces” is a proper consideration in assessing military advantage.⁸³

⁷⁸ ICRC Commentary on Additional Protocol I. Article 5(4)(a), ¶ 1953.

⁷⁹ Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, in 8 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 38 (Timothy L.H. McCormack 2005) (quoting *Prosecutor v. Galić*, (hereafter “*Galić*”) Case No. IT-98-29-T, Judgment and Opinion, ¶¶ 50-51, 55 (5 December 2003).

⁸⁰ ICRC CIL Study, Practice, Ch. 2, ¶ 335 (quoting Netherlands, *Military Manual* (1993)).

⁸¹ See, e.g., ICRC CIL Study, Practice, Ch. 2, ¶¶ 334, 337 (quoting manuals of Italy and Spain). The U.S. Naval Handbook states that determinations of whether civilians have taken a direct part in hostilities and thus may lawfully be attacked must likewise be made by “[c]ombatants in the field,” who “must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person’s behavior, location and attire, and other information available at the time.” ICRC CIL Study, Practice, Ch. 1, ¶ 830. Canada’s Law of Armed Conflict Manual states that “[a] concrete and direct military advantage exists if the commander has an honest and reasonable expectation that the attack will make a relevant contribution to the success of the overall operation.” ICRC CIL Study, Practice, Ch. 4, ¶ 169.

⁸² ICRC CIL Study, Practice, Ch. 2, ¶ 336 (quoting New Zealand’s Military Manual) (emphasis added); see also ¶¶ 329, 332, 334, 337 (quoting manuals of Australia, Germany, Italy, and Spain). The United States Government likewise recognizes that “the anticipated military advantage need not be expected to immediately follow from the success of the attack, and may be inferred from the whole military operation of which the attack is a part.” ICRC CIL Study, Practice, Ch. 2, ¶ 361 (quoting the Report on U.S. Practice, 1997).

⁸³ See ICRC CIL Study, Practice, Ch. 2, ¶¶ 329, 331, 336, 339 (quoting manuals of Australia, Ecuador, New Zealand, and the United States); see also *id.* ¶ 361 (noting U.S. Government’s view that “[t]he foreseeable military advantage from an attack includes increasing the security of the attacking force.”). See also Noam Neuman, *Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law*, 7 Yearbook of Int’l Hum. L. 79,

[FOOTNOTE CONTINUED ON NEXT PAGE]

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106. The manuals recognise as well that objects “normally dedicated to civilian purposes, but which are being used for military purposes” (such as houses, schools or churches) lose their protection under the applicable law, and may properly become lawful “military objectives.”⁸⁴ This reality becomes particularly important when a party, in violation of its own obligations under the Law of Armed Conflict (*see* Section V.A(1)(b) below), deliberately places combatants and weaponry at or near civilian sites in order to shield them from attack, and thus exposes civilians to significant harm. As noted in the 2007 edition of the Operational Law Handbook, issued by the United States Air Force Judge Advocates Corps, “Use refers to how an object is *presently* being used.”⁸⁵ Thus, as the Handbook notes, “[e]xamples of enemy military objectives which by their use make an effective contribution to the military action” would include “*an enemy headquarters located in a school, an enemy supply dump located in a residence, or a hotel which is used as billets for enemy troops.*”⁸⁶
107. The loss of absolute protection for a civilian site when it is misused by the adversary as a locus for military operations is broadly recognised in the Law of Armed Conflict.⁸⁷ Thus, for instance, the hidden placement of a significant military asset within a civilian building or even the presence of enemy combatants can make the otherwise civilian site amenable to attack.⁸⁸ This is a harsh reality of urban warfare.
108. Attacks must not be “*indiscriminate*,” that is, untargeted, launched without consideration as to where harm will likely fall.⁸⁹ As W. Hays Park has explained, “[t]his distinction is

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

91-96, 109, 111 (2005) (“When interpreting the term ‘similar military advantage,’ ... it seems obvious that the lives of the soldiers must be taken into account.”).

⁸⁴ ICRC CIL Study, Practice, Ch. 2, ¶ 687 (quoting Australia’s Defence Force Manual, 1994); *see also* ¶¶ 688-705 (quoting other military manuals).

⁸⁵ *See* Judge Advocates Corps, U.S. Air Force, Operational Law Handbook (2007 edition), at 22 (emphasis added), available at <http://www.fas.org/irp/doddir/army/law2007.pdf>.

⁸⁶ *Id.* (emphasis added).

⁸⁷ *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF ARMED CONFLICT (Cambridge University Press 2004), at 99 (“The real test in land warfare is whether a given place, inhabited by civilians, is actually defended by military personnel. Should that be the case, the civilian object becomes – owing to its use – a military objective.”).

⁸⁸ Charles Garraway, Moderator, Panel Discussion at the U.S. Naval War College: When Civilian Objects Become Military Objectives, 78 INTERNATIONAL LAW STUDIES 214-216, Blue Book series (“[I]f a prescribed area *is defended* [by opposing military forces], any building within the area (other than an assembly point for the collection of wounded, marked as such) would be exposed to attack, irrespective of its ostensible status as a civilian object.”).

⁸⁹ Additional Protocol I, art. 51(4).

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not determined by the amount of the devastation or the number of deaths, but by the direction of the action itself, i.e., by what is deliberately intended and directly done.”⁹⁰

109. In keeping with this understanding in customary international law, Additional Protocol I defines indiscriminate attacks as:

“(a) Those which are not directed at a specific military objective;

(b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or

(c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.”⁹¹

110. As these provisions indicate, a commander’s *intent* is critical in reviewing the principle of distinction during armed conflict. Where it is believed in good faith, on the basis of the best available intelligence, that a civilian building has been misused as a sanctuary for military fighters, military intelligence, or the storage and manufacture of military assets, the commander has a legitimate basis for using force against the site. This is so even where judgment is based on limited information in a fluid battlefield situation.
111. The definition of military targets thus could include terrorists who move rapidly throughout a neighbourhood, even where they shelter themselves in civilian dwellings. It does not relieve the commander of the obligation to judge the proportionality of his action. But it makes clear that a civilian site can be converted to a legitimate target by the conduct of the opposing force in using such places for military purposes, including the escape of armed combatants.
112. Quite apart from the tenets of legitimate targeting are the additional prerequisites of the criminal law. Mistakes made in armed conflict do not, as such, constitute war crimes. The centrality of a commander’s intent means that the incidence of civilian casualties does not serve to establish a violation of the principle of distinction. And reasoning from hindsight is also not sufficient. It does not reveal what a commander could have known or forecast at the time. As two leading scholars have recognised, “[t]he prerequisite for a grave breach

⁹⁰ W. Hays Park, *AIR WAR AND THE LAWS OF WAR*, 32 A.F.L. Rev. 1, 5 (1990) (citing Paul Ramsey, *THE JUST WAR: FORCE AND POLITICAL RESPONSIBILITY* 154 (1968)).

⁹¹ Additional Protocol I, art. 51(4).

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is intent; the attack must be intentionally directed at the civilian population or individual civilians, and the intent must embrace physical consequences.”⁹²

113. The ICTY itself has found that for an attack to qualify as a war crime, it “must have been conducted *intentionally* in the *knowledge*, or when it was impossible not to know, that civilians or civilian property were being targeted.”⁹³
114. In short, military operations that cause *unintended* and unwanted damage to civilians do not constitute violations of the Law of Armed Conflict, much less a war crime.
115. While Hamas deliberately sought to harm civilians by launching rockets and mortars on towns in Southern Israel, and even boasted about directing their attacks at civilian populations,⁹⁴ the IDF carefully checked and cross-checked targets — using best available real-time intelligence — to make sure they were being used for combat or terrorist activities, and not instead solely for civilian use. In the event of reasonable doubt, the IDF refrained from attacking targets until such time as it could confirm their status as legitimate military objectives. This was consistent with the IDF’s formal rules of engagement for the Gaza Operation, which ordered commanders and soldiers to direct strikes solely against military objectives and combatants,⁹⁵ and prohibited intentional strikes on civilians or civilian objects.⁹⁶

(b) The Obligation of Parties to an Armed Conflict Not to Jeopardise Their Own Civilians

116. The principle of distinction imposes obligations on the conduct of all parties, including those controlling the territory where the hostilities take place.

⁹² Rüdiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 675, 697 (Dieter Fleck ed., 2d ed. 2008).

⁹³ *Galić*, ¶ 42 (quoting *Prosecutor v. Blaškić*; Case No. IT-95-14-T, Trial Judgment, ¶ 180 (3 March 2000)). *See also id.*, ¶ 54 (explaining that Additional Protocol I, art. 85(3)(a) “qualifies as a grave breach the act of *wilfully* ‘making the civilian population or individual civilians the object of attack’). The ICRC Commentary likewise confirms that “in relation to criminal law the Protocol requires intent and, moreover, with regard to indiscriminate attacks, the element of prior knowledge of the predictable result.” Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions 12 June 1949 (International Committee of the Red Cross, 1987) (hereafter “ICRC Commentary on Additional Protocol I”), art. 51(2), at ¶ 1934.

⁹⁴ *See* Section V.B(1) below (noting, for example, statements made by Hamas officials that they were deliberately directing their rockets at Israeli population centers).

⁹⁵ Although the term “combatants” derives from the Law of Armed Conflict applicable to international armed conflicts, it is used here to describe the members of Hamas’ armed force in Gaza, with no prejudice to the classification of the conflict itself.

⁹⁶ *See* Section V.C(2) below.

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117. The Fourth Geneva Convention prohibits the use of civilians to shield certain areas from attack and provides that the presence of civilians does not shield an otherwise permissible military target from attack: “The presence of a protected person may not be used to render certain points or areas immune from military operations.”⁹⁷ Additional Protocol I is categorical in barring the use of “human shields”:

“The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.”⁹⁸

118. Violation of this obligation, which is a core principle of customary international law binding on both States and non-State actors, constitutes a “war crime.”
119. In this case, as explained in Section V.B below, Hamas violated this core principle of customary international law. Its operatives admitted, for example, that they frequently carried out rocket fire from schools (such as the Sakhnin school in the area of Abu Halima, and another school in the al-Amal neighbourhood), precisely because they *knew* that Israeli jets would not fire on the schools.⁹⁹ They describe incidents in which Hamas activists requested children to wheel carts laden with rockets, in case IDF forces noticed them.¹⁰⁰ In fact, one Hamas legislator boasted on television of encouraging women, children and the elderly to form human shields to protect military sites against Israeli attack.¹⁰¹ The Secretary-General of the United Nations confirmed receiving reports of Hamas using children and others as shields to prevent attacks against launch sites and other military targets.¹⁰²

⁹⁷ Geneva Convention IV, art. 28.

⁹⁸ Additional Protocol I, art. 51(7).

⁹⁹ See Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at <http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx>.

¹⁰⁰ *Id.*

¹⁰¹ Transcript of Statement of Hamas Member of Palestinian Legislative Council, Fathi Hamad, *Al-Aqsa TV*, 29 February 2008, video available at <http://www.youtube.com/watch?v=ArJbn-lUCh4>.

¹⁰² Report of the Secretary-General on Children and Armed Conflict, delivered to the Sixty-third session of the General Assembly, U.N. Doc. S/2009/158, 26 March 2009.

(2) The Principle of Proportionality

(a) The Obligation to Weigh Military Objectives Against Incidental Civilian Harm

120. In addition to the principle of distinction, customary international law bars military attacks that are anticipated to harm civilians excessively in relation to the expected military advantage. This principle, known as the “principle of proportionality,” is reflected in Additional Protocol I, which prohibits launching attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹⁰³ The “elements of crimes” drafted in the Rome Statute of the International Criminal Court¹⁰⁴ implementation process and approved by the Assembly of States Parties to the Rome Statute clarifies two key matters as well — that the actionable offence of causing “excessive incidental death, injury or damage” is established only where these matters were “clearly excessive,” and that excess and proportion is to be judged “in relation to the concrete and direct overall military advantage anticipated.”¹⁰⁵ While Israel is not a party to either Additional Protocol I or the Rome Statute, it accepts these clarifications as reflective of customary international law.
121. The very notion of not inflicting “excessive” harm recognises that some civilian casualties may be unavoidable when pursuing legitimate military objectives. Numerous military manuals reflect this grim reality.¹⁰⁶ General A.P.V. Rogers, former Director of British Army Legal Services, has explained that:

“Although they are not military objectives, civilians and civilian objects are subject to the general dangers of war in the sense that attacks on military personnel and military objectives may cause incidental damage. It may not be possible to limit the radius of effect entirely to the objective to be attacked, a weapon may not function properly or be deflected by defensive measures, or a civilian object may be attacked by mistake because of faulty intelligence. Similarly, civilians working in military objectives, though not themselves legitimate targets, are at risk if those objectives are attacked. Members of the armed forces are not liable for

¹⁰³ Additional Protocol I, art. 51(5)(b).

¹⁰⁴ Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17 July 1998.

¹⁰⁵ See Elements of Crimes, at Article 8(2)(b)(iv).

¹⁰⁶ Australia’s Defence Force Manual states, for example, that “Collateral damage may be the result of military attacks. This fact is recognised by [the Law of Armed Conflict] and, accordingly, it is not unlawful to cause such injury and damage.” ICRC CIL Study, Practice, Ch. 4, ¶ 14. See also ICRC CIL Study, Practice, Ch. 4, ¶ 18 (quoting Canada’s Law of Armed Conflict Manual) and ¶ 48 (quoting U.S. Naval Handbook).

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such incidental damage, *provided it is proportionate* to the military gain expected of the attack.”¹⁰⁷

122. By definition, then, evaluation of proportionality (or excessive harm to civilians compared to military advantage) requires balancing two very different sets of values and objectives, in a framework in which all choices will affect human life. States have duties to protect the lives of their civilians and soldiers by pursuing proper military objectives, but they must balance this against their duty to minimise incidental loss of civilian lives and civilian property during military operations. That balancing is inherently difficult, and raises significant moral and ethical issues. Indeed, as the Committee established to review NATO’s bombing campaign in the former Yugoslavia emphasised:

“The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied. It is relatively simple to state that there must be an acceptable relation between the legitimate destructive effect and undesirable collateral effects. ... Unfortunately, most applications of the principle of proportionality are not quite so clear cut. It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values.”¹⁰⁸

123. It is precisely because this balancing is difficult that international law confirms the need to assess proportionality from the standpoint of a “reasonable military commander,” possessed of such information as was available at the time of the targeting decision and considering the military advantage of the attack as a whole. Moreover, the balancing may not be second-guessed in hindsight, based on new information that has come to light; it is a forward-looking test based on expectations and information at the time the decision was made. This perspective is confirmed by the use of the word “anticipated” within the text of the rule itself, as well as in the explanations provided by numerous States in ratifying Additional Protocol I.¹⁰⁹

¹⁰⁷ Major General A.P.V. Rogers, Lecture delivered at Lauterpacht Center for International Law, University of Cambridge: Command Responsibility under the Law of War (1999) available at www.lcil.cam.ac.uk/Media/lectures/doc/COMDRESP.doc (emphasis added).

¹⁰⁸ NATO Bombings, Final Report to the ICTY Prosecutor, ¶ 48.

¹⁰⁹ See, e.g., ICRC CIL Study, Practice, Ch. 4, ¶ 195 (noting Austria’s statement that “with respect to any decision taken by a military commander, *the information actually available at the time of the decision is determinative*” for judging proportionality in attack) (emphasis added). Numerous other States have made similar declarations. See *id.* ¶¶ 196-205. As Germany stated forcefully, “the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and *not on the basis of hindsight*.” *Id.* ¶ 199 (emphasis added).

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124. Inevitably, different soldiers in combat make different choices in balancing competing values and interests. As the Committee Established to Review NATO Bombings in Yugoslavia explained to the ICTY Prosecutor,

“It is unlikely that a human rights lawyer and an experienced combat commander would assign the same relative values to military advantage and injury to noncombatants. Further, it is unlikely that military commanders with different doctrinal backgrounds and differing degrees of combat experience or national military histories would always agree in close cases. It is suggested that the determination of relative values must be that of the ‘*reasonable military commander*’.”¹¹⁰

125. Thus, the core question, in assessing a commander’s decision to attack, will be (a) whether he or she made the determination on the basis of the best information available, given the circumstances, and (b) whether a reasonable commander could have reached a similar conclusion. As W. Hays Park has explained, “[u]nintentional injury is not a violation of the principle of non-combatant immunity unless, through *wilful and wanton neglect*, a commander’s actions result in excessive civilian casualties that are tantamount to an intentional attack.”¹¹¹
126. The same criteria for assessing “military advantage” apply in the proportionality context, namely that the “military advantage anticipated” from a particular targeting decision must be considered from the standpoint of the overall objective of the mission.¹¹² In addition, it may legitimately include not only the need to neutralise the adversary’s weapons and ammunition and dismantle military or terrorist infrastructure, but also — as a relevant but not overriding consideration — protecting the security of the commander’s own forces.¹¹³
127. The standard does not penalise commanders for making close calls. Rather, it is intended to prohibit “[*m*]anifestly disproportionate collateral damage inflicted in order to achieve operational objectives,” because this results in the action essentially being a “form of indiscriminate warfare.”¹¹⁴
128. As with the principle of distinction, a showing of *intent* is required for there to have been any arguable “war crime” based on excessive civilian harm in comparison with military

¹¹⁰ NATO Bombings, Final Report to the ICTY Prosecutor, ¶ 50-1 (emphasis added).

¹¹¹ W. Hays Parks, Book Review, 28 Geo. Wash. J. Int’l L. & Econ. 207, 218 (1995) (emphasis added).

¹¹² See ICRC CIL Study, Practice, Ch. 4, ¶¶ 161-165, 167-174.

¹¹³ See, e.g., ICRC CIL Study, Practice, Ch. 4, ¶¶ 161, 169.

¹¹⁴ Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 119, 135 (Dieter Fleck ed., 2d ed. 2008) (emphasis added).

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objectives. As customary international law is reflected in the specific relevant section of the Rome Statute, for example, it is clear that a war crime requires the “intentional launching” of an attack “in the *knowledge* that such attack will cause incidental loss of life or injury to civilians ... which would be *clearly excessive* in relation to the concrete and direct overall military advantage anticipated.”¹¹⁵ In other words, from this very definition, the existence of a war crime turns not on the reasonableness of the commander’s weighing of military advantage against civilian harm, but on whether he or she *knew* that the attack would cause clearly disproportionate harm, but proceeded intentionally notwithstanding this knowledge.¹¹⁶

129. In other words, there is no indication of a “war crime” simply because others conclude, after the conflict, that a different decision — often, a snap decision taken on the battlefield — could have led to fewer civilian casualties. To the contrary, if the commander in the field did not intend and did not know that the attack would cause clearly excessive levels of civil harm, there is no legal basis for labelling it as war crime.
130. In this case, as demonstrated below, the IDF took extensive steps to weigh the risk of civilian harm against the existence of important military objectives, based on the information available at the time of targeting decisions. Such assessments were a significant part of IDF training and rules of engagement,¹¹⁷ and they were implemented in the field. As discussed further in Section V.C(3), for attacks planned in advance, each operation and target was considered on an individual basis (and reviewed by several authorities, including legal officers) in order to ensure that it met the requirements of proportionality. The same analysis was frequently repeated in the field based on real time data, immediately prior to an attack, to confirm that excessive civilian harm was not anticipated.
131. On numerous occasions, this review led to a decision *not* to attack legitimate military targets, to avoid the possibility of civilian harm, even though such an attack might not be excessive in relation to the anticipated military advantage. As just one example of many, as documented by photographs in Section V.B(2), Israeli forces identified a rocket launcher between two school buildings on 18 January 2009, but refrained from attacking

¹¹⁵ Rome Statute, art. 8(2)(b)(iv).

¹¹⁶ The ICTY has adopted a similar standard, explaining that “[t]o establish the *mens rea* of a disproportionate attack the Prosecution must prove . . . that the attack was launched *wilfully and in knowledge* of circumstances giving rise to the expectation of excessive civilian casualties.” *Galić*, ¶ 59 (emphasis added).

¹¹⁷ See Section V.C(2) (quoting operational order under which legitimate military objectives should not be attacked if “the expected harm to civilians or civilian objects ... would [] be excessive in relation to the military advantage anticipated”).

because of its proximity to the schools. The IDF also refrained from attacking Shifa Hospital in Gaza City, despite Hamas' use of an entire ground floor wing as its headquarters during the Gaza Operation,¹¹⁸ out of concern for the inevitable harm to civilians also present in the hospital. On other occasions, attacks were approved using precision guided munitions, but the missiles were diverted moments before impact, because civilians were spotted in the target area.¹¹⁹ On still other occasions, as discussed in Section V.C(4), a decision was made to proceed with a strike, but only under certain specified conditions designed to minimise civilian casualties, such as the time of the attack, the type of weapons permitted, or required precautions prior to attack.¹²⁰

(b) The Obligation of Attacking Forces to Take Feasible Precautions to Minimise Incidental Civilian Harm

132. In addition to the obligation to refrain from acts that would harm civilians disproportionately in relation to anticipated military advantage, Additional Protocol I requires both parties to a conflict to take “feasible” precautions to minimise incidental loss of civilian life.¹²¹ From the perspective of the attacker, this means “do[ing] everything feasible to verify that the objectives to be attacked ... are military objectives,”¹²² and “tak[ing] all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing” civilian harm.¹²³ It also requires the provision of “effective advance warning ... of attacks which may affect the civilian population, unless circumstances do not permit.”¹²⁴
133. In assessing the adequacy of precautions, under the provisions of Additional Protocol I, the measure is one of “feasibility,” not perfection. The United States has taken the position, for example, that “measures to minimize civilian casualties and damage must be taken to

¹¹⁸ A Hamas activist captured by IDF forces during the operation confirmed during his interrogation that senior Hamas members were hiding out in Shifa Hospital during the Gaza Operation. See Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at <http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx>; see also Amir Mizroch, *Dichter: Hamas salaries paid at Shifa Hospital*, Jerusalem Post, 12 January 2009, available at <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1231424936164>.

¹¹⁹ See IDF Spokesperson Unit, *IDF VLOG: Israeli Airstrikes Aborted to Protect Civilians*, 14 January 2009, available at <http://idfspokesperson.com/2009/01/14/idf-vlog-israeli-airstrikes-aborted-to-protect-civilians/>.

¹²⁰ For specific examples, see Section V.D(2) (describing attacks approved for the middle of the night, when nearby offices would presumably be empty; attacks limited to precision munitions or utilizing delay fuses; and numerous incidents of advance warnings to civilians).

¹²¹ See Additional Protocol I, art. 57(2)(a)(i), (ii).

¹²² Additional Protocol I, art. 57(2)(a)(i).

¹²³ Additional Protocol I, art. 57(2)(a)(ii).

¹²⁴ Additional Protocol I, art. 57(2)(c).

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the extent that military necessities permit under the circumstances ruling at the time.”¹²⁵ Numerous other States have emphasised the limitations of practicality,¹²⁶ and that assessments consider the circumstances prevailing at the time of the decision, not after the fog of war has lifted and hindsight reveals other options and consequences.¹²⁷ In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated:

“The obligation to do everything feasible is high but not absolute.... Both the commander and the aircrew actually engaged in operations must have some range of discretion to determine which available resources shall be used and how they shall be used. Further, a determination that inadequate efforts have been made to distinguish between military objectives and civilians or civilian objects should not necessarily focus exclusively on a specific incident.”¹²⁸

134. The requirement of effective warnings to the civilian population is also tempered by the express caveat, “unless circumstances do not permit.”¹²⁹ The circumstances in question include the effect on achievement of the military mission or the security of the forces. As the U.S. Naval Handbook states,

“When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity. Such warnings are not required, however, if mission accomplishment requires the element of surprise or the security of the attacking forces would otherwise be compromised.”¹³⁰

135. The nature of the combat and the tactics of the adversary also affect the practicality of various precautions, including advance warnings. As the Canadian Judge Advocate General has explained,

“The reality of combat must also be taken into consideration when assessing precautionary measures. As a result, the written word of the Protocols must be interpreted in the practical context within which the rules were designed to be applied. Those assessing the actions of those

¹²⁵ ICRC CIL Study, Practice, Ch. 5, ¶ 125 (citing Report on US Practice, 1997).

¹²⁶ ICRC CIL Study, Practice, Ch. 5, ¶¶ 147-158.

¹²⁷ ICRC CIL Study, Practice, Ch. 5, ¶¶ 147-158, 182-183.

¹²⁸ NATO Bombings, Final Report to the ICTY Prosecutor, ¶ 29.

¹²⁹ Additional Protocol I, art. 57(2)(c); *see also* ICRC CIL Study, Rule 20.

¹³⁰ U.S. Naval Handbook (1995), ¶ 11.2, *see also* ¶ 8.5.2; ICRC CIL Study, Practice, Ch. 5, ¶ 457.

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participating in targeting decisions must remember that “[d]etached reflection cannot be demanded in the presence of an upturned knife.”¹³¹

136. As a stark example, consider an adversary that launches mortars or anti-tank missiles from within civilian areas. There may be no choice except to return fire, even though this creates jeopardy for the civilians in the vicinity. Issuing an advance warning of the counter-fire may also be impractical, because it gives the shooter time to move. For this reason, advance warnings to the civilian population may be feasible mostly before hostilities begin in a particular area, or where the lack of surprise or speed of response does not significantly affect military advantage.
137. In certain circumstances, general warnings might be adequate in order to fulfil the obligations of the parties to an armed conflict under international law. Indeed, the U.S. Air Force Pamphlet (explains that “[t]he practice of states recognizes that warnings need not always be given. General warnings are more frequently given than specific warnings, lest the attacking force or the success of its mission be jeopardized.”¹³² The United States endorsed this view during hostilities in the Gulf region in 1991, stating that “[a] warning need not be specific; it may be a blanket warning, delivered by leaflets and/or radio, advising the civilian population of an enemy nation to avoid remaining in proximity to military objectives.”¹³³ The ICRC has recognised that “[i]n U.S. practice, bombardment warnings have often been general in their terms, e.g. advising civilians to avoid war-supporting industries, in order not to alert the air defence forces of an impending attack on a specific target.”¹³⁴
138. During the Gaza Operation, the IDF took precautions that were consistent with the safeguards required by law or suggested by the practice of other countries. As discussed further in Section V.C(4) below, the IDF not only implemented a range of precautions related to targeting and munitions, but also used an extensive system of graduated warnings to civilians, including both general advance warnings through media broadcasts and widespread leafleting, regional warnings to alert civilians to leave specific areas before IDF operations commenced, and specific warnings to civilians in or near military targets, through telephone calls and warning shots with light weapons. While these warnings,

¹³¹ Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, in YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 25 (Timothy L.H. McCormack ed., 2005).

¹³² U.S. Air Force Pamphlet (1976), ¶¶ 5-3(c)(2)(d); ICRC CIL Study, Practice, Ch. 5, ¶ 456 (emphasis added); see also *id.* ¶ 457 (“warnings may be general rather than specific lest the bombarding force or the success of its mission be placed in jeopardy”).

¹³³ ICRC CIL Study, Practice, Ch. 5, ¶ 483 (emphasis added). The Department further insisted that “[t]he ‘unless circumstances do not permit’ recognizes the importance of the element of surprise. Where surprise is important to mission accomplishment and allowable risk to friendly forces, a warning is not required.” *Id.*

¹³⁴ ICRC CIL Study, Practice, Ch. 5, ¶ 485.

unfortunately, could not eliminate all harm to civilians, they were frequently effective, as aerial surveillance many times was able to confirm the resulting evacuation of numerous civilians prior to an attack by the IDF.

(c) The Parallel Obligation of Those Controlling Territory to Minimise Civilian Casualties

139. The parties in control of the territory where the hostilities take place also have obligations under the Law of Armed Conflict to minimise civilian harm, including with regard to their own population. Thus, the parties to the conflict “shall, to the maximum extent feasible, take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.”¹³⁵ This means they should “*avoid locating* military objectives within or near densely populated areas,”¹³⁶ and in anticipation of hostilities, they must “*endeavour to remove* the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives.”¹³⁷ To do the opposite — to place weapons systems in or near apartment buildings, schools, mosques or medical facilities, or to encourage civilians to gather in areas that are likely military targets — violates the Law of Armed Conflict, because such tactics inevitably increase civilian casualties beyond what otherwise might occur in connection with an attack on a legitimate military target.
140. Thus, combatants who choose to fight from within civilian buildings bear responsibility for the consequences, because their very presence in such structures “will make an attack against them legitimate.” As the ICRC explains in its Commentary to Additional Protocol I,
- “It is clear that a belligerent who accommodates troops in purely civilian buildings, for example, in dwellings or schools, or who uses such buildings as a base for combat, exposes them and the civilians present there to serious danger: even if attacks are directed only against members of the armed forces, it is probable that they will result in significant damage to the buildings.”¹³⁸
141. During the Gaza Operation, Hamas made it a centrepiece of its military strategy to locate combat forces and weapons in civilian areas, in stark contrast to the IDF’s significant efforts to minimise harm to civilians. As discussed below in Sections IV.B and V.D,

¹³⁵ Additional Protocol I, art. 58(c).

¹³⁶ Additional Protocol I, art. 58(b) (emphasis added).

¹³⁷ Additional Protocol I, art. 58(a) (emphasis added).

¹³⁸ ICRC Commentary to Additional Protocol I, art. 57(2)(a)(i), ¶ 2196.

Hamas *deliberately* exposed civilians to harm. It launched rockets from and established weapons workshops and storage sites near homes, schools, mosques and U.N. facilities; it used residences and public institutions as bases of operation; it misused medical facilities and ambulances; and it booby-trapped entire civilian neighbourhoods. The evidence is overwhelming, set forth in photographs, in independent press reports, and in Hamas' own boasts to local media.

B. Hamas' Breaches of the Law of Armed Conflict and War Crimes

142. Both prior to and during the IDF operation in Gaza, Hamas flouted the Law of Armed Conflict, terrorising Israeli citizens through an endless barrage of rocket and mortar attacks, and deliberately using Palestinian civilians, as well as protected U.N., educational, medical, administrative (so-called governmental) and religious facilities, as a cover for its operations. In adopting such methods of warfare, members of Hamas committed internationally recognised war crimes, and made it impossible for the IDF to avoid collateral damage to civilians and civilian objectives in pursuit of legitimate military objectives during the operation.
143. As the evidence discussed below illustrates, the tactics and *modus operandi* of Hamas and other terrorist organisations offend the most fundamental legal and moral norms of human behaviour.
144. While the examples of Hamas' violations of the Law of Armed Conflict cited in this report are far from exhaustive, they illustrate the extraordinary challenges that the tactics of Hamas posed for the IDF, as a military force committed to respecting its obligations under international law. As explained below, Hamas has violated a myriad of basic norms of International Humanitarian Law.

(1) Deliberate Rocket Attacks Against Israeli Population Centres

145. As described in Section IV.B above, for many years Hamas engaged in deliberate, systematic and widespread use of rocket attacks, mortar attacks and suicide bombings intentionally directed at civilian targets in Israel.¹³⁹ The international community,

¹³⁹ See, e.g., Report, *Erased In A Moment - Suicide Bombing Attacks Against Israeli Civilians*, Human Rights Watch, 15 October 2002 available at <http://www.hrw.org/en/reports/2002/10/15/erased-moment> and Report, *Israeli civilians victims of attacks by armed Palestinian groups*, Médecins du Monde, July 2003; available at <http://www.reliefweb.int/library/documents/2003/mdm-opt-21jul.pdf> (which has also coined the term “democide” to name the suicide bombing attacks).

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including the United Nations, the Quartet of Middle East mediators,¹⁴⁰ the European Union,¹⁴¹ the United States,¹⁴² the United Kingdom¹⁴³ and many other States and international bodies, have condemned Hamas' rocket attacks.

146. Hamas' rocket attacks directed at Israel's civilian population centres deliberately violated the basic principles of distinction.¹⁴⁴ Any doubt about this is resolved by the fact that Hamas itself has boasted of its intention to hit population centres. It is well accepted in customary international law that "[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities" constitutes a war crime.¹⁴⁵
147. In this case, numerous international observers have recognised that Hamas was intentionally engaging in deliberate attacks, in violation of the Law of Armed Conflict. Even well before the escalation of rocket attacks in 2008, the United Nations Under-Secretary General for Political Affairs condemned Hamas rocket fire on Sderot as "legally and morally wrong."¹⁴⁶ The United Nations Under-Secretary General for Humanitarian Affairs stated that "there's no justification" under the law for the firing of the rockets,

¹⁴⁰ Quartet Joint Statement from Russian Foreign Minister Sergei Lavrov, U.S. Secretary of State Condoleezza Rice, United Nations Secretary-General Ban Ki-moon, High Representative for European Foreign and Security Policy Javier Solana, German Foreign Minister Frank-Walter Steinmeier, and European Commissioner for External Relations Benita Ferrero-Waldner, 30 May 2007, available at http://www.un.org/news/dh/infocus/middle_east/quartet-30may2007.htm; "The Quartet strongly condemned the continued firing of Qassam rockets into Southern Israel as well as the buildup of arms by Hamas and other terrorist groups in Gaza. It endorsed PA President Abbas' call for an immediate end to such violence, and called upon all elements of the PA government and all Palestinian groups to cooperate with President Abbas to that end."

¹⁴¹ European Union Presidency statement, 16 May 2007: "The EU Presidency condemns in the strongest possible terms the Kassam missile attacks launched from the Gaza Strip against Israeli territory which have caused many injuries during the last few days and appeals to Palestinian leaders to do everything in their power to stop them. An escalation of violence must be prevented."

¹⁴² State Department Daily Press Briefing by Spokesman Sean McCormack, 17 May 2007, available at <http://www.imra.org.il/story.php3?id=34365>: "Violence perpetrated by Hamas, as we have seen recently, doesn't further the cause of peace. What it does is result in the deaths of innocent civilians and it also underscores the importance of reaching those political accommodations on the Israeli-Palestinian track among those individuals who are committed to peace like Prime Minister Olmert, like President Abbas, and the people around him and that work directly for him. We would hope that Hamas would make another choice; in making a choice for peace, in making a choice for a Palestinian state, because the only way that they're going to see that is via the negotiating table. They're not going to see it by launching Qassam rockets into Israel. They're not going to see it by attacking the legitimate security forces of the Palestinian Authority. They're not going to see it by sending young people armed with suicide vests to blow up other Israeli youngsters." See also Press release, *Sderot hit by Kassam barrage from Gaza*, Israel Ministry of Foreign Affairs, 1 June 2007, available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Palestinian+terror+since+2000/Sderot+hit+by+Kassam+barrage+from+Gaza+-+May+2007.htm>.

¹⁴³ Margaret Beckett, the British Secretary of State for Foreign and Commonwealth Affairs, said in a statement: "I also deplore rocket attacks from Gaza against Israel, attacks that are bringing suffering to Israeli civilians."

¹⁴⁴ Additional Protocol I, arts. 48, 51(2), 52(1).

¹⁴⁵ Rome Statute, art. 8(2)(b)(i).

¹⁴⁶ Greg Myre, *UN Official Touring Israel is Near Area Hit by Rocket*, The New York Times, 22 November 2006 (quoting Ibrahim Gambari), available at <http://www.nytimes.com/2006/11/22/world/middleeast/22mideast.html?pagewanted=print>.

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because “[t]hey are indiscriminate, there’s no military target.”¹⁴⁷ And the U.N. Secretary-General confirmed his view that the rocket attacks in Israel were “targeting and injuring civilians.”¹⁴⁸

148. Hamas *deliberately* targets rockets and mortar rounds at Israeli population centres and specifically intends to cause the maximum amount of civilian death and suffering. Hamas cheers when one of its rockets or mortars succeeds in hitting a civilian target, whether that be a private home or public institution. For instance, the following Hamas poster boasts of homes destroyed by missiles in Southern Israel:



► Hamas poster depicting Israeli civilian homes destroyed by rocket fire

149. It is therefore clear that the *purpose* of Hamas’ incessant rocket attacks on Israel’s southern towns and cities, in addition to causing death, injury and destruction, is to spread terror among Israel’s civilian population. This also constitutes a serious violation of the Law of Armed Conflict. As discussed above, it is a core principle of customary international law that:

¹⁴⁷ Isabel Kershner, *Israeli incursion into Gaza Strip Kills 4 militants*, The New York Times, 17 February 2008, (quoting John Holmes) available at <http://www.nytimes.com/2008/02/17/world/africa/17iht-mideast.4.10121958.html>.

¹⁴⁸ Press Release, *Secretary General Profoundly Concerned at Escalating Violence, Growing Casualties in Gaza*, Statement SG/SM/10997/PAL/2074 (Spokesman of Secretary General Ban Ki-moon), 16 May 2007, available at <http://www.un.org/News/Press/docs/2007/sgsm10997.doc.htm>.

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“Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”¹⁴⁹

150. In sum, in launching rocket and mortar attacks against Israeli targets, Hamas is guilty of repeated and deliberate violations of the Law of Armed Conflict — and because these violations were wilful, its leaders and operatives are guilty of committing war crimes.

(2) Abuse of Civilian Sites as Cover for Military Operations

151. The Law of Armed Conflict not only prohibits targeting an enemy’s civilians; it also requires parties to an armed conflict to distinguish their combatant forces from their *own* civilians, and not to base operations in or near civilian structures, especially protected sites such as schools, medical facilities and places of worship. As the customary law principle is reflected in Article 51(7) of Additional Protocol I,

“The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular attempts to shield military objectives from attacks or shield, favour or impede military operations.”

152. This general prohibition applies with particular force to schools and other facilities regularly attended by children. Thus, “[c]hildren shall be the object of special respect and shall be protected against any form of indecent assault.”¹⁵⁰ Medical facilities and ambulances are also singled out for special protection. Thus, “[u]nder no circumstances shall medical units be used in an attempt to shield military objectives from attack.”¹⁵¹ Similarly, combatants are forbidden to use places of worship such as mosques in support of military efforts.¹⁵²
153. The reason for these rules is clear. When a party to an armed conflict uses civilian and protected spaces for military purposes, those spaces become legitimate targets for the opposing side, thereby placing civilian lives and infrastructure in grave danger.¹⁵³
154. Despite the clear proscriptions of international law, the intentional abuse of civilian areas for military advantage is central to Hamas’ battlefield strategy. During the recent conflict

¹⁴⁹ Additional Protocol I, art. 51(2).

¹⁵⁰ Additional Protocol I, art. 77(1).

¹⁵¹ *Id.*, art. 12(4).

¹⁵² *Id.*, art. 53.

¹⁵³ See, e.g., ICRC Commentary on Additional Protocol I, Article 52(4)(a), ¶ 1953 (noting that “[i]n combat areas it often happens that purely civilian buildings or installations are occupied or used by the armed forces and such objectives may be attacked, provided that this does not result in excessive losses among the civilian population.”).

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in Gaza, as described below, Hamas launched rockets from near schools, used hospitals as bases of operation, stored weapons in mosques, and booby-trapped entire neighbourhoods, all in contravention of clear and specific prohibitions of international law. Hamas' strategy was two-fold: (1) to take advantage of the sensitivity of the IDF to civilian casualties on the Palestinian side, in an attempt to deter the IDF from attacking legitimate military targets; and (2) where the IDF did attack, to wield an excellent propaganda weapon against Israel, featuring civilian casualties as well as damage to homes and public institutions. In other words, Hamas chose to base its operations in civilian areas not in spite of, but *because of*, the likelihood of substantial harm to civilians. The tactic did succeed in causing IDF to forego attacks on legitimate military objectives in order to protect the lives of innocent Palestinians and to preserve intact important public facilities. But in many cases, the IDF could not forego a legitimate military objective without undermining its mission and jeopardising both its soldiers and Israeli civilians. In those circumstances, the result of Hamas' approach was to make it difficult, and sometimes impossible, for IDF forces to avoid harm to civilians and civilian structures.

(a) Staging of Attacks From Residential Areas and Protected Sites

155. Hamas operatives regularly fired rockets into Israel from within or near residential and public buildings, including schools, mosques and hospitals. The following images illustrate the use of this tactic in the 18 months prior to the Gaza Operation:¹⁵⁴



- Left: Rockets fired at Israel from civilian areas in Beit Lahia (27 February 2008, Israeli Channel 10 TV); Right: PRC rocket fire into Israeli territory (Muqawamah Website, 27 February 2008)

¹⁵⁴ Numerous videos detailing this and other Hamas tactics are available on the Ministry of Foreign Affairs Video Resource Library, at <http://www.mfa.gov.il/MFA/Visual+Media/The-IDF-operation-in-Gaza-14-Jan-2009.htm>, as well as on the website of the Intelligence and Terrorism Information Center, at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e062.htm#a.

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- A pit from which rockets were fired in the middle of a residential area (Source: IDF Spokesperson, 29 December 2008)



- Rockets positioned on the roof of a house (YouTube, 11 July 2007, picture from the Izz al-Din al-Qassam Brigades propaganda bureau); Right: Mortar launcher positioned near a house (Source: Al-Aqsa TV, 26 October 2007)



- Rocket Launching position near public buildings in the Shati Refugee Camp (Source: IDF Spokesperson)

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156. On 29 October 2007, Hamas launched a mortar attack from the yard of the central building of an United Nations Relief and Works Agency (UNRWA) educational complex in the town of Beit Hanoun in the northern Gaza Strip. The Secretary-General of the U.N. condemned this incident.¹⁵⁵



- Rocket launching squad positioned near the main building of an UNRWA educational complex in Beit Hanoun (Source: IDF Spokesperson, 31 October 2007)

157. A similar incident took place on 18 January 2009, immediately after Israel announced the end of its Operation in Gaza: Israeli forces identified a rocket launcher placed immediately between two school buildings. The Israeli Air Force did not attack the launcher because of its proximity to the schools, as shown on the image below.



- Firing rockets near two school buildings after Israel announced it was holding its fire (Source: IDF Spokesperson, 18 January 2009)

¹⁵⁵ Press Release, *Ban Ki-moon condemns rocket attack from Gaza school run by UN agency*, U.N. News Centre, 8 November 2007, available at <http://www.un.org/apps/news/story.asp?NewsID=24593&Cr=palestin&Cr1>.

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158. Hamas activist N.A., a resident in Atatra, was arrested by the IDF during the Gaza Operation. In his investigation, N.A. admitted that Hamas operatives frequently carried out rocket fire from schools (for example, the Sakhnin school in the area of Abu Halima, and another school in the area of the al-Amal neighbourhood), precisely because they knew that Israeli jets would not fire on schools.¹⁵⁶
159. During the Gaza Operation, Hamas continued to launch attacks from densely populated areas and protected sites. In fact, as IDF forces advanced into Gaza, Hamas began relying even more heavily than before on rocket and mortar launches from the midst of urban centres. Human Rights Watch, in a letter to EU Foreign Ministers, strongly condemned this practice, confirming that it has “documented cases in which Hamas fired rockets from very near populated homes or other civilian objects.”¹⁵⁷
160. *Newsweek* vividly described one instance of Hamas’ abuse of civilian housing:
- “Suddenly there was a terrific whoosh, louder even than a bomb explosion. It was another of Hamas’ homemade Qassam rockets being launched into Israel — and the mobile launchpad was smack in the middle of the four [apartment] buildings, where every apartment was full...”¹⁵⁸
161. Hamas’ abuse of civilian neighbourhoods resulted in significant destruction. As *Corriere della Sera* reported on 21 January 2009, quoting the testimony of “Um Abdallah”:
- “Practically all of the tallest buildings in Gaza that were hit by Israeli bombs... had rocket launching pads on their roofs, or were observation decks for the Hamas. They had also put them near the big UN warehouse, which went up in flames.”¹⁵⁹
162. In conducting rocket attacks from within civilian sites, Hamas committed grave breaches of the principle of distinction, as well as the obligation not to put its own civilians at risk.

¹⁵⁶ See Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at <http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx>.

¹⁵⁷ Letter from Lotte Leicht to EU Foreign Ministers, 16 March 2009, available at <http://www.hrw.org/en/news/2009/03/16/letter-eu-foreign-ministers-address-violations-between-israel-and-hamas> (emphasis added).

¹⁵⁸ Rod Nordland, *Hamas and Its Discontents*, *Newsweek*, 20 January 2009, available at <http://www.newsweek.com/id/180691/output/print>.

¹⁵⁹ Lorenzo Cremonesi, *Così i ragazzini di Hamas ci hanno utilizzato come bersagli*, *Corriere della Sera*, 21 January 2009, available at http://www.corriere.it/esteri/09_gennaio_21/denuncia_hamas_cremonesi_ac41c6f4-e802-11dd-833f-00144f02aabc.shtml.

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(b) Use of Civilian Homes and Public Institutions as Bases of Operation

163. In addition to staging rocket attacks from civilian areas, Hamas conducted much of its fighting during the Gaza Operation from bases within private residences and public facilities, which Hamas assumed the IDF would be reluctant to attack. As documented further detailed in subsection V.B(3) below, Hamas' main base of operations during the Gaza Operation was located inside Shifa Hospital in Gaza City, which was not attacked by Israeli forces out of concern for the inevitable harm to civilians also present in the hospital. Hamas' decision to place the lives of hundreds of patients, doctors, and nurses in danger in this manner, however, is in clear breach of the principle of distinction and its particular application in the case of medical facilities, as described above.
164. Similarly, Hamas abused the protection accorded to places of worship, making a practice of storing weapons in mosques. During the Gaza Operation, the IDF found repeated and conclusive evidence of such use. For instance, as the photographs below demonstrate, IDF forces discovered weapons in a mosque in Jabaliya:



► Weapons, including an anti-tank cannon, discovered in a Jabaliya mosque during the Gaza Operation

165. R.A., a Hamas activist arrested by the IDF during the Gaza Operation, revealed his knowledge of Hamas storage places for weapons, including the houses of activists,

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- tunnels, orchards and mosques. In particular, he indicated, the Salah al-Din Mosque served as a storage site for rockets and other weapons.¹⁶⁰
166. In some cases, IDF forces fired on mosques known to serve as weapons storehouses and bases of operation. Further confirmation that weapons were indeed stored on the premises came in the form of large secondary explosions.¹⁶¹
167. There is also considerable evidence that Hamas misused a variety of other public institutions as operational bases. I.Y.H., a resident of Beit Hanoun, was arrested by the IDF during the Gaza Operation. I.Y.H. told IDF investigators about a Hamas training camp in Khan Younis that was located in a sports complex behind the Omar Ibn Abd al-Aziz Mosque, across from the municipality, as well as rocket firing from a grove in the area of Beit Hanoun and tunnels dug in the area of Khan Younis. He also revealed knowledge of a laboratory for manufacturing explosives and rockets, located in the civil administration complex in the Jabaliya refugee camp.¹⁶²
168. Hamas also intentionally located its military activities adjacent to sensitive sites, such as schools and U.N. facilities, or in the midst of residential neighbourhoods.¹⁶³ The following aerial photographs offer some examples:

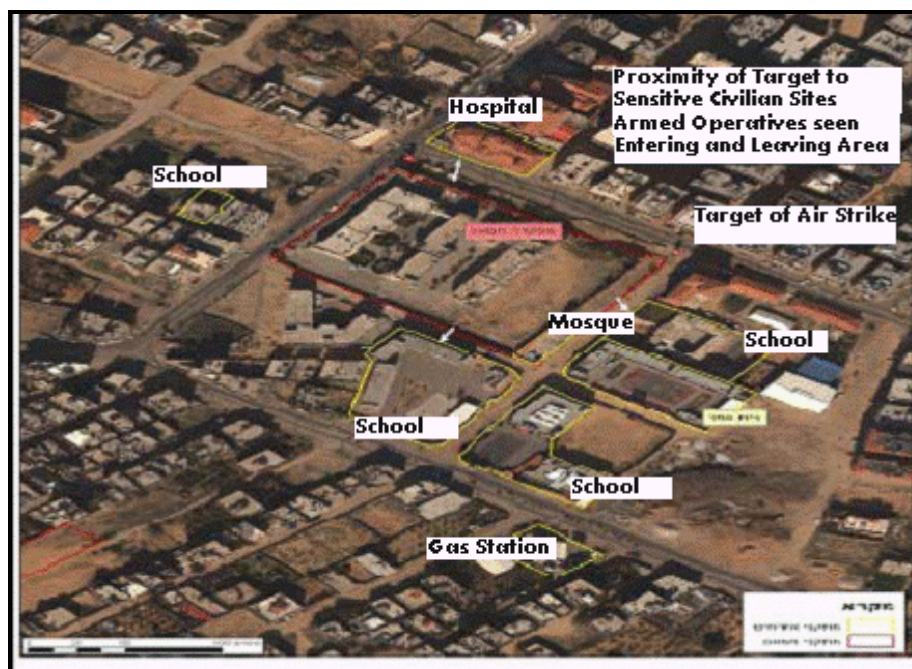
¹⁶⁰ See Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at <http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx>.

¹⁶¹ See video footage showing an IAF strike sets off numerous secondary explosions, caused by munitions stockpiled in a mosque, available at http://dover.idf.il/IDF/English/News/the_Front/08/12/3102.htm.

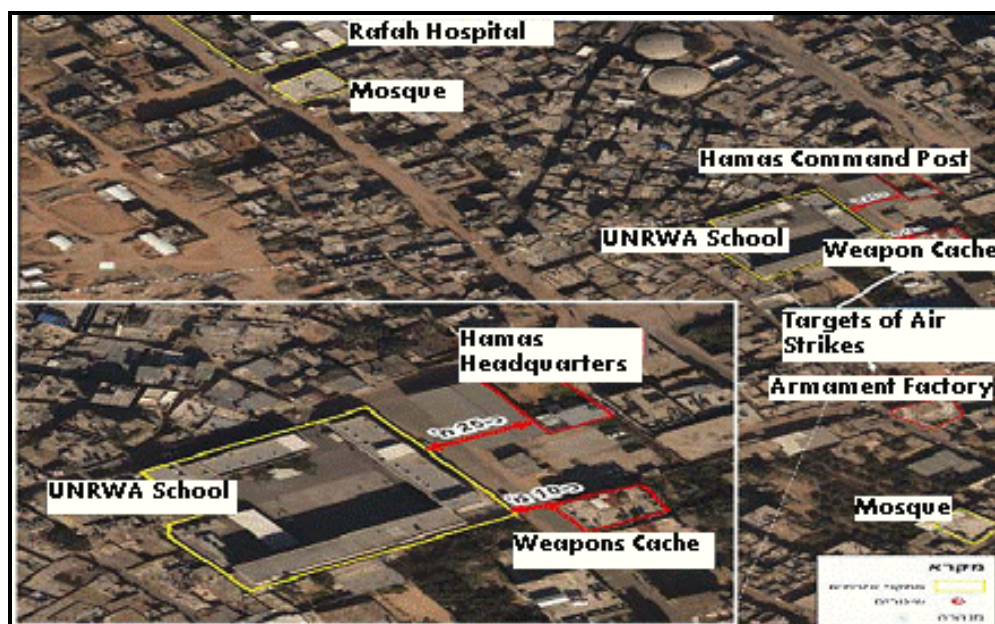
¹⁶² See Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at <http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx>.

¹⁶³ Regarding the use of houses for military purposes, see http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e062.pdf. For the use of mosques for military purposes, see http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e059.pdf and http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e059.htm. Regarding Hamas' use of schools, see http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e060.htm and http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e055.htm.

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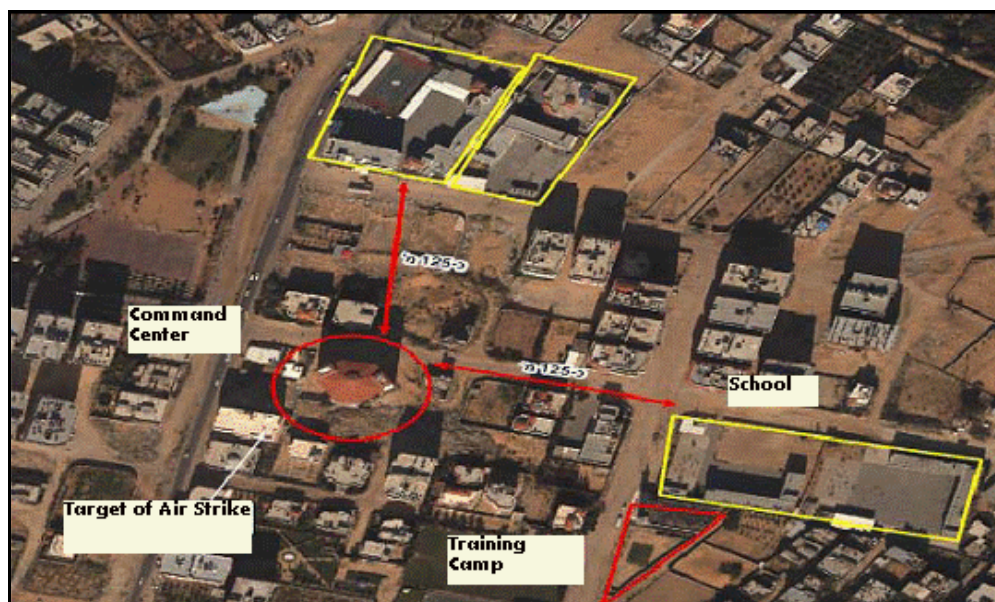


- Hamas headquarters (red) surrounded by schools (yellow) in Tel al-Hawa neighbourhood, southwest of Gaza City. In proximity to the headquarters and schools armed men were seen entering and leaving the Hamas compound (Source: IDF Spokesperson)

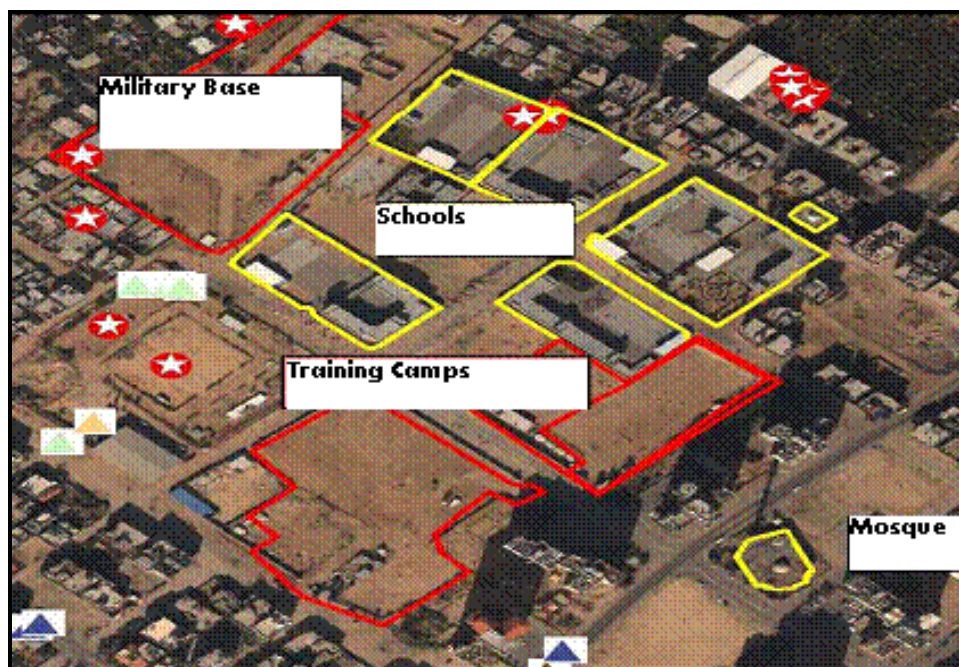


- Hamas post and arms cache (red) near an UNRWA school (yellow) in Rafah. The military facilities are about 25 and 10 metres from the school. The Hamas post is in the enlargement (Source: IDF Spokesperson)

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- Training camp and headquarters (red) 125 metres from schools (yellow) in Gaza City (Source: IDF Spokesperson)



- Training camps and a military camp (marked in red) near schools (marked in yellow) in the Sheikh Radwan neighbourhood of Gaza City. The red dots with white stars designate launching points of rockets (Source: IDF Spokesperson)

169. During the Gaza Operation, Hamas frequently commandeered the homes of civilians as temporary bases to attack Israeli forces. A reporter from *Der Spiegel* recounted this story, based on an interview with a Palestinian who agreed to speak so long as his full name was not used, due to intimidation by Hamas:

“Hail also found out after the cease-fire that the militants had used his house as a base for their operations. The door to his house stood open and there were electric cables lying in the hallway. When Hail followed them they led to his neighbor’s house which it seems Hamas had mined. As Hail, in his mid-30s, sat on his porch and thought about what to do a man came by: He was from Hamas and had left something in Hail’s home. He let him in and the man then emerged with a bullet proof vest, a rocket launcher and an ammunitions belt. An hour later a fighter with Islamic Jihad called to the door, then disappeared onto the roof and reappeared with a box of ammunition.”¹⁶⁴

170. According to some reports, Hamas operatives took pride in endangering the lives of civilians and refused their pleas to go away. *Panorama-Italy* described an incident at an eight-story building, home to about 170 Palestinian civilians, in the Al-Nasser neighbourhood in Gaza. When Hamas terrorists positioned themselves on the roof, a former Palestinian colonel tried to explain to them that they would draw Israeli bombs upon the children of the building. “It will be a great honour if you will die with us,” replied the “defenders of Gaza.” When the officer insisted that Hamas relocate, they fired a burst of Kalashnikov fire over his head to get rid of him.¹⁶⁵

(3) Misuse of Medical Facilities and Ambulances

171. During the Gaza Operation, Hamas systematically used medical facilities, vehicles and uniforms as cover for terrorist operations, in clear violation of the Law of Armed Conflict. This included the extensive use of ambulances bearing the protective emblems of the Red Cross and Red Crescent to transport operatives and weaponry; the use of ambulances to “evacuate” terrorists from the battlefield; and the use of hospitals and medical infrastructure as headquarters, situation-rooms, command centres, and hiding places.¹⁶⁶
172. Ismail Haniyeh, the head of Hamas in the Gaza Strip, located his Southern Command centre in one of the Shifa Hospital units, while the senior leaders of Hamas stationed themselves in another unit.¹⁶⁷ On the ground floor of the hospital’s main building, an entire

¹⁶⁴ Ulrike Putz, *Gaza in Ruins: ‘Who Has Won Here?’* Spiegel Online International, 23 January 2009, available at <http://www.spiegel.de/international/world/0,1518,603203,00.html>.

¹⁶⁵ Fausto Biloslavo, *Gaza: la sporca guerra di Hamas*, *Panorama-Italy*, 16 February 2009, available at <http://blog.panorama.it/mondo/2009/02/16/gaza-la-sporca-guerra-di-hamas/>.

¹⁶⁶ See Intelligence and Terrorism Information Center, *Gazans Tell How Hamas Used Them As Human Shields*, 28 January 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e052.htm.

¹⁶⁷ A Hamas activist captured by IDF forces during the operation confirmed during his interrogation that senior Hamas members were hiding out in Shifa Hospital during the Gaza Operation. See Israel Security Agency, *Selected Examples of Interrogations Following Operation Cast Lead*, available at <http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx>; see also Amir Mizroch, *Dichter: Hamas salaries paid at Shifa Hospital*, *Jerusalem Post*, 12 January 2009, available at <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1231424936164>.

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wing was closed off and used solely by Hamas operatives. At the wing's entrance, Hamas military operatives blocked entry to all civilians. Hamas operatives also seized control of sections of Al-Shifa Hospital. In addition, Hamas took control of a Red Crescent medical clinic in Khan Younis, converting it into a prisoner detention facility.¹⁶⁸

173. According to *Newsweek*, Palestinian gunmen admitted using the al-Quds hospital for firing at Israel:

“One of the most notorious incidents during the war was the Jan. 15 shelling of the Palestinian Red Crescent Society buildings in the downtown Tal-al Hawa part of Gaza City, followed by a shell hitting their Al Quds Hospital next door; the subsequent fire forced all 500 patients to be evacuated... In the Tal-al Hawa neighborhood nearby, however, Talal Safadi, an official in the leftist Palestinian People's Party, said that resistance fighters were firing from positions all around the hospital. He shrugged that off, having a bigger beef with Hamas. ‘They failed to win the battle.’”¹⁶⁹

174. A report from *Corriere della Sera* confirms that the grounds, ambulances and uniforms of the al-Quds hospital had been hijacked by terrorist operatives:

“Magah al Rachmah, aged 25, residing a few dozen meters from the four large buildings of the now seriously damaged health complex, says about this fact: ‘The men of Hamas took refuge mainly in the building that houses the administrative offices of al Quds. They used the ambulances and forced ambulance drivers and nurses to take off their uniforms with the paramedic symbols, so they could blend in better and elude Israeli snipers.’”¹⁷⁰

175. The same report also alluded to Hamas' occupation of Shifa hospital:

“Also, Shifah, the largest hospital in the city, is far from being completely used up. It seems however that its basements are densely occupied. ‘Hamas had hidden there the emergency cells and the interrogation room for the prisoners of Fatah and the secular left front that had been

¹⁶⁸ See *PA Health Ministry: Hamas Using Hospitals as Detention Centers*, Ma'an News Agency, 7 February 2009, available at <http://www.maannews.net/eng/ViewDetails.aspx?ID=208410&MARK=hospital>. This practice was also used prior to the Gaza Operation. For additional accounts by Red Cross personnel of attacks on hospitals by Palestinian militants in June 2007, including killing of patients in the hospitals, see Alison Caldwell, *Hospitals offer no safety in Gaza strip*, Radio National Australia, available at <http://www.abc.net.au/pm/content/2007/s1950580.htm>

¹⁶⁹ Rod Nordland, *Hamas and Its Discontents*, *Newsweek*, 20 January 2009, available at <http://www.newsweek.com/id/180691/output/print>.

¹⁷⁰ Lorenzo Cremonesi, *Così i ragazzini di Hamas ci hanno utilizzato come bersagli*, *Corriere della Sera*, 21 January 2009, available at http://www.corriere.it/esteri/09_gennaio_21/denuncia_hamas_cremonesi_ac41c6f4-e802-11dd-833f-00144f02aabc.shtml.

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evacuated from the bombarded Saraja prison,” say the militants of the Democratic Front for the Liberation of Palestine.”¹⁷¹

176. Hamas operatives made particular use of ambulances, which frequently served as an escape route out of a heated battle with IDF forces.¹⁷²
177. The *Sydney Morning Herald* reported an extensive interview in January 2009 with Muhammad Shriteh, an ambulance driver who evacuated wounded Palestinians from the battle zones. Mr. Shriteh stated that during most of the Gaza Operation, he would “co-ordinate with the Israelis before we pick up patients... so they would not shoot at us.” The more immediate threat was from Hamas, he indicated, because they “would lure the ambulances into the heart of a battle to transport fighters to safety.”¹⁷³
178. Mr. Shriteh also reported that one night, after the first week of fighting, “there was a call from a house in Jabaliya.” Because of the urgency of the call, he said, there was no time to arrange his movements with the IDF. Nevertheless, he knew the Israelis were watching him because “I could see the red laser beam on the ambulance and on me.” Mr. Shriteh stated that when he entered the house in Jabaliya he saw three Hamas operatives who had taken cover inside, and that half of the building had already been destroyed. “They were very scared, and very nervous,” he said. “They dropped their weapons and ordered me to get them out, to put them in the ambulance and take them away.” He refused because, he said, he knew that if the IDF saw him, he would not be able to pick up any more wounded people. One of the Hamas operatives, he said, put a gun to his head but he still refused, and then they allowed him to leave.¹⁷⁴
179. Mr. Shriteh added that during the Gaza Operation, Hamas operatives made several attempts to hijack the ambulance fleet of al-Quds Hospital, located in the Tel al-Hawa neighbourhood in Gaza City. To deny Hamas the use of these ambulances, medical workers “had to get in all the ambulances and make the illusion of an emergency and only come back when [Hamas] had gone.”¹⁷⁵

¹⁷¹ *Id.*

¹⁷² For examples of the use made by Hamas of U.N. ambulances to evacuate armed terrorists from battle zones see http://www.terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/pdf/hamas_028.pdf.

¹⁷³ Jason Koutsoukis, *Hamas tried to hijack ambulances during Gaza war*, *Sydney Morning Herald*, 26 January 2009, available at <http://www.smh.com.au/news/world/hamas-tried-to-hijack-ambulances-during-gaza-war/2009/01/25/1232818246374.html>.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

180. This unlawful use of medical facilities and vehicles by Hamas endangered medical personnel as well as the sick and wounded, while severely undermining the special protections afforded by customary international law to these persons in times of armed conflict. Such acts constitute serious violations of the Law of Armed Conflict: Under Article 23(f) of the 1907 Regulations annexed to the Hague Convention IV Respecting the Laws and Customs of War on Land, which reflects customary international law, it is “especially forbidden...[t]o make improper use of a flag of truce, ... as well as the distinctive badges of the Geneva Convention.” Article 44 of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) also provides that: “... the emblem of the Red Cross on a white ground ... may not be employed, either in time of peace or in time of war, except to indicate or to protect the medical units and establishments...”¹⁷⁶

(4) Booby-trapping of Civilian Areas

181. Another tactic of Hamas during the Gaza Operation involved booby-trapping of homes, roads, schools and even entire neighbourhoods with mines and explosives, in order to inflict casualties on advancing IDF forces. This practice recklessly endangered the nearby civilians and buildings, which inevitably suffered during explosions. In essence, the Hamas strategy was to transform the urban areas of the Gaza Strip into a massive death trap for IDF forces, in gross disregard for the safety of the local civilian population.¹⁷⁷
182. On 6 January 2009, during IDF activity in the Zeitun neighbourhood of Gaza City, weapons were found in a zoo near a school. Detonator cables were also found, leading to a back room where weapons were located:

¹⁷⁶ Similarly, Article 38 of Additional Protocol I states that:

(1) It is prohibited to make improper use of the distinctive emblem of the Red Cross, Red Crescent or ... of other emblems, signs or signals provided for by the Conventions

(2) It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

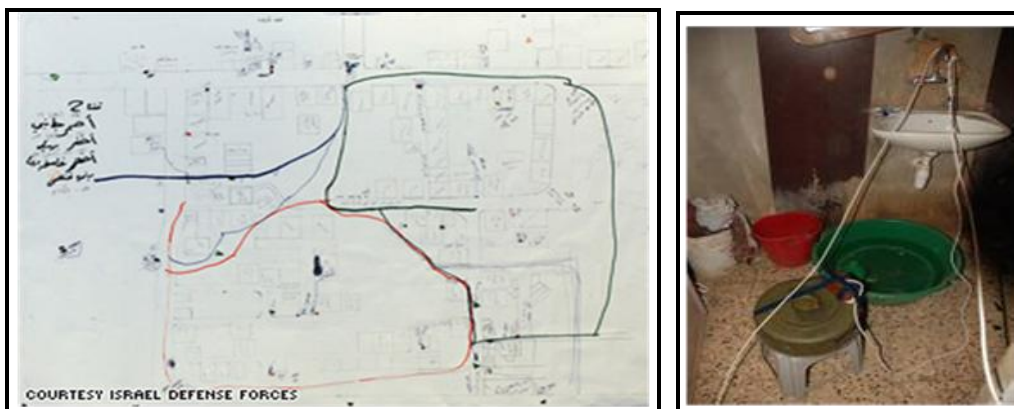
¹⁷⁷ See Intelligence and Terrorism Information Center, *Civilians as Human Shields*, 19 January 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e046.htm.

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- Left: IDF forces conducting a search near the booby-trapped school. Right: The white fuse running around the structure is visible near the wall (Source: IDF Spokesperson, 11 January 2009)

183. A Hamas operational map captured by Israeli forces during the Gaza Operation shows the locations of booby traps in homes and near gas stations, as well as sniper positions inside mosques:



- Left: A Hamas operational map captured by Israeli forces during the Gaza Operation shows the locations of booby traps in homes and near gas stations, as well as sniper positions inside mosques. Right: Booby-trapped residential building

184. The use of booby traps by Hamas often created a multiplier effect with respect to collateral damage from IDF strikes and advancing forces. Secondary blasts from Hamas explosives destroyed homes and injured civilians who would have been unharmed were it not for the use of such tactics. The booby-trap locations were unknown to the IDF and thus could not be fully accounted for in targeting decisions and during operational activities. Such harm was impossible to foresee in advance by the IDF and could not be taken into account in the proportionality analysis. Furthermore, because roads and buildings were often mined to explode, IDF forces had to target them to protect themselves, and sometimes needed to create alternative pathways through neighbourhoods that had also been heavily booby-trapped.

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185. The resulting damage is a clear and predictable consequence of Hamas' decision to wrap entire communities in a "suicide belt" of explosives. Hamas' actions violate the Law of Armed Conflict, which prohibits the reckless endangerment of civilians.¹⁷⁸

(5) Blending in with Civilians and Use of Human Shields

186. In addition to hiding behind civilian facilities, Hamas uses civilians themselves, including women and children, as human shields.¹⁷⁹ Armed operatives mingle routinely with civilians in order to cover their movements. In many instances, Hamas deliberately encouraged civilians, including children, to congregate and act as human shields in locations where the IDF had provided prior warnings to civilians of pending attacks. On 29 February 2008, Fathi Hamad, a Hamas legislator, openly boasted about the practice on al-Aqsa TV:

"[the enemies of Allah] do not know that the Palestinian People has developed its [methods] of death and death-seeking. For the Palestinian people, death became an industry, at which women excel and so do all people on this land: the elderly excel, the mujahideen excel and the children excel. Accordingly, [Hamas] created a human shield of women, children, the elderly and the mujahideen, against the Zionist bombing machine."¹⁸⁰

187. Hamas activist M.A., a resident of Jabaliya, was arrested by the IDF during the Gaza Operation. During questioning he provided information about Hamas' exploitation of the civilian population:

¹⁷⁸ See Section V.A(1)(b).

¹⁷⁹ Several videos illustrating this practice are available (in Hebrew) on the website of the Intelligence and Terrorism Information Center. See, e.g., Intelligence and Terrorism Information Center, *Hamas modus operandi – Terrorist shooting from a roof of a house and using children as a human shield*, 6 January 2009, available at http://www.terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/video/v9.wmv (depicting terrorist shooting from roof of house, calling out to civilians to help him get out of the house, and leaving the house protected by children as shields); Intelligence and Terrorism Information Center, *Hamas modus operandi – Hamas terrorist searching for shelter after shooting rockets towards Israel*, available at http://www.terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/video/v10.wmv (depicting terrorist pushing himself into a group of children after firing rocket towards Israel); Intelligence and Terrorism Information Center, *Preventing the harming of uninvolved persons – Hamas terrorists integrate with civilians in order to avoid being hit and thus endangering uninvolved civilians*, 12 January 2009, available at http://www.terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/video/v11.wmv (depicting targeting of senior terrorist by IDF forces and cancellation of attack after children and woman holding a baby arrive); Intelligence and Terrorism Information Center, *Preventing the harming of uninvolved persons – Weapons and ammunition are located in the building – The IDF notified the tenants to evacuate the building – In order to prevent attack on the building, many civilians go up on the roof*, 27 December 2008, available at http://www.terrorism-info.org.il/malam_multimedia/Hebrew/heb_n/video/v12b.wmv (showing civilians arriving on roof of building containing Hamas weapons cache to protect it from announced IDF strike).

¹⁸⁰ Transcript of Statement of Hamas Member of Palestinian Legislative Council, Fathi Hamad, *Al-Aqsa TV*, 29 February 2008, video available at <http://www.youtube.com/watch?v=ArJbn-IUCh4>.

“[M.A.] reported in his interrogation that Hamas activists exploit innocent civilians, women and children, for the sake of their activities, to avoid being targeted by IDF forces. He related, for example, that he had hidden in a house with innocent civilians and changed his clothes so as not to be arrested. He was also witness to an incident in which Hamas activists requested a 12 year old child to wheel a cart laden with rockets while they walked at a distance, in case IDF forces noticed them. He also said that Hamas instructed its members to fire from mosques and schools, on the assumption that Israel would not respond with fire to such locations; and similarly, regarding civilian lands. He noted as well that senior members of the organization ran away and hid in bunkers while they sent junior activists to fight, and that Hamas activists shot at Fatah activists on the assumption that they were pleased with the IDF forces’ entrance of the Gaza Strip.”¹⁸¹

188. The practices described above purposely endangered civilians and therefore breach the Law of Armed Conflict, contravening the fundamental principle of distinction between combatants and non-combatants.¹⁸²
189. In addition to the specific violations by Hamas forces, Hamas officials in Gaza also violated their legal obligations towards the civilian population under their control.

(6) Exploitation of Children

190. In addition to employing minors as terrorist operatives and suicide bombers, Hamas routinely exploited children in military support roles for intelligence gathering, tunnel digging, weapons smuggling, collecting weapons from dead terrorists, and logistical support, all in clear violation of international law.
191. In his annual report to the Security Council on the issue of “Children and Armed Conflict,” the Secretary-General of the United Nations referred to this practice, and to the difficulties in obtaining concrete information about it:

“While there have been reported incidents of children being trained and/or used by Palestinian militant groups in Gaza, community members are reluctant to provide information on cases of children used by armed forces or armed groups for fear of reprisals. Significant progress has been made towards the implementation of an informal monitoring system on child rights violations. There are concerns that Hamas reportedly used children as shields and may have used schools and hospitals or areas in their proximity to launch rockets into

¹⁸¹ See Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at <http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx>.

¹⁸² See Section V.A(1).

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Israel during the December 2008 and January 2009 hostilities. These concerns must be further investigated.”¹⁸³

192. The media has widely reported Hamas’ recruitment and exploitation of children. *Corriere della Sera* published the testimony of Abu Issa, aged 42 and a resident of the Tel Awa neighbourhood:

“The militiamen of Hamas tried on purpose to provoke the Israelis. Often they were young boys, aged 16 or 17, armed with submachine guns. They couldn’t do anything against tanks and jet fighters. They knew they were much weaker. But they wanted them to fire on our houses so they may later accuse them [the Israelis] of war crimes.”¹⁸⁴

193. During the summer of 2008 Hamas organised “summer camps” for teenagers in the Gaza Strip in order to provide them with military training and militant indoctrination. As the children participated in drills resembling those of the Hamas security services, Hamas gunmen would walk among them, proclaiming that they were training tomorrow’s leaders.¹⁸⁵ The clear intent of these training camps was the recruitment of the child participants into the Hamas organisation and its militant anti-Israeli ideology.
194. The practice of using children as fighters or for other military purposes violates the Law of Armed Conflict, including prohibitions against allowing children to take part in hostilities. As customary international law is reflected in this regard in Additional Protocol I, the parties to a conflict must take “all feasible measures” to ensure that children “do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces.”¹⁸⁶

(7) Interference with Humanitarian Relief Efforts

195. Far from taking measures to protect Palestinian civilians during the fighting in Gaza, Hamas forces acted in a manner that prevented humanitarian relief coordinated by the IDF with various international aid organisations from reaching its intended recipients. While the IDF observed humanitarian pauses in fighting, Hamas fired rockets during these periods, attacked crossing points into Gaza through which much-needed supplies arrived,

¹⁸³ The Secretary-General, Report of the Secretary-General on Children and armed conflict, ¶¶ 86-87, delivered to the Security Council and the General Assembly, U.N. Doc. S/2009/158, A/63/785 (26 March 2009).

¹⁸⁴ Lorenzo Cremonesi, *Così i ragazzini di Hamas ci hanno utilizzato come bersagli*, *Corriere della Sera*, 21 January 2009, available at http://www.corriere.it/esteri/09_gennaio_21/denuncia_hamas_cremonesi_ac41c6f4-e802-11dd-833f-00144f02aabc.shtml.

¹⁸⁵ Associated Press, *Hamas Summer School Graduates Now Ready for Battle with Israel*, *Haaretz*, 11 August 2008, available at <http://www.haaretz.com/hasen/pages/1010449.html>.

¹⁸⁶ Additional Protocol I, art. 77(2).

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and hijacked those supplies once they crossed the border. These actions exacerbated the suffering of the Palestinian population of Gaza.

196. All of these actions violate the Law of Armed Conflict, which requires parties to allow the entry of humanitarian supplies and to guarantee their safety. Article 59 of the Fourth Geneva Convention requires parties in an armed conflict to “permit the free passage of [humanitarian] consignments and shall guarantee their protection.” Article 60 of the same Convention protects the shipments from being diverted from their intended purpose.
197. During the Gaza Operation, the IDF unilaterally implemented humanitarian pauses in fighting to allow the local population to re-supply and attend to the wounded.¹⁸⁷ These pauses were exploited by Hamas to fire rockets and mortars into Israel and to attack IDF forces. During the period between 8 January 2009 and 17 January 2009, Hamas fired a total of 44 rockets and mortars at Israel during humanitarian pauses. The following IDF statistics show the number rocket and mortar launches occurring during humanitarian pauses in a single three day period from 10 to 12 January 2009:
- 10 January 2009 between 13:00 and 16:00 - 5 launches;
 - 11 January 2009 between 11:00 and 14:00 - 12 launches; and
 - 12 January 2009 between 10:00 and 13:00 - 10 launches.
198. Hamas and other terrorist organisations have also continued a practice of launching attacks against crossing points, which provide the only entry points for humanitarian aid to the Gaza Strip. The following incidents were documented during the first eight months of 2008:
- 2 August: Sniper fire and three mortar attacks are reported at the Nahal-Oz fuel terminal into Gaza;
 - 13 July: Two mortars are fired at Kibbutz Nahal-Oz, approximately 875 yards (800 metres) from fuel crossing;
 - 8 July: A mortar shell fired from the Gaza Strip lands in Kibbutz Ein Hashlosa;

¹⁸⁷ See Section V.C(4)(c) below.

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- 7 July: Two mortar shells are fired from Gaza fall close to Karni goods crossing and Kibbutz Nahal-Oz;
- 6 July: Armed Palestinian terrorists open fire on agricultural farmers working close to the Nahal-Oz crossing;
- 22 May: A truck bomb, containing four tons of explosives, explodes at the Erez pedestrian crossing into Gaza;
- 19 April: The Kerem Shalom goods crossing is attacked by two car bombs, wounding 13 IDF soldiers;
- 13 April: Five mortars are fired at Kerem Shalom crossing;
- 9 April: Mortars fired at Nahal-Oz terminal. Terrorists later infiltrate the crossing and shoot dead two workers;
- 23 March: Two mortars fall in close proximity to the Sufa crossing;
- 29 February: A mortar falls next to the Sufa crossing;
- 18 February: Two rockets fired towards Kibbutz Nahal-Oz, approximately 875 yards (800 metres) from fuel crossing;
- 16 February: Five rockets fired toward Kibbutz Nahal-Oz;
- 12 February: Mortars are fired which fall near Nahal-Oz fuel terminal;
- 6 February: A mortar shell is fired at Sufa goods crossing, forcing its closure;
- 18 January: Eight mortars are fired at Sufa crossing;
- 12 January: A Qassam rocket falls near Erez pedestrian crossing;
- 7 January: Palestinian Islamic Jihad attempts to bomb Erez pedestrian crossing but attack is thwarted; and

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- 1 January: Five mortars are fired at Sufa goods crossing.
199. Hamas' attacks on crossing points continued during the Gaza engagement. For instance, on 12 January 2009, when the Karni crossing was opened to allow truck loads from Israel into the Gaza Strip, IDF forces searching in the area found a tunnel that was dug in the direction of the crossing for the purpose of carrying out a terrorist attack. The crossing was subsequently re-closed for fear that additional tunnels have been dug. In another incident, an explosive tunnel was discovered near the Nahal Oz fuel terminal, substantially increasing the risk of transferring industrial diesel for the Gaza power station through the Kerem Shalom crossing from Israel to Gaza.
200. Perhaps the most serious interference with humanitarian relief efforts by Hamas consisted of hijacking humanitarian supplies once they arrived in Gaza. On 12 January 2009 it was reported by the Jerusalem Post that "Hamas raided some 100 aid trucks that Israel had allowed into Gaza, stole their contents and sold them to the highest bidders."¹⁸⁸ Internet user Abu Mohamed of Khan Younis wrote on 9 January 2009 at 21.40 that:

"Hamas is selling the humanitarian aid to the big merchants. They are exploiting people's suffering and do not care about the martyrs, the wounded and those who have fled their homes. They commandeered the UNRWA lorries and put the supplies in their own storehouses. Ask the chief of emergency services in Rafah, the engineer Sh'hiber. Hamas people are seizing all the goods entering Gaza and selling them to the big merchants. Ask the merchant Hamed from Khan Younes who is selling the aid from Jordan to the small merchants. Also the aid from Egypt is being sold and distributed to their people only. Everyone in Gaza knows this, but the people are silent. Only Hamas are profiting from the people's disasters. We ask that all the aid go through the above organizations."

201. A participant on a Fatah Internet forum said that:

"The aid goes into Hamas' stores. They sell it to poor civilians ... who are forced to wear green berets [identifying them with Hamas] to be able to buy it. If you don't wear a green beret, there is neither food nor drink for you in Gaza."

¹⁸⁸ Yaakov Katz et al., *Hamas Raids Aid Trucks, Sells Supplies*, The Jerusalem Post, 12 January 2009, available at <http://www.jpost.com/servlet/Satellite?cid=1231424932109&pagename=JPost/JPArticle/ShowFull>.

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202. He also complained that the aid was not distributed by organisations such as UNRWA and the Red Cross, but by Hamas.¹⁸⁹ Another participant added that “the Hamas militias take the aid that arrives and give it to movement operatives ... Hamas sells the aid ... at higher than normal prices.”
203. Captured Hamas activist N.A. reported to investigators that “employees of the Hamas government took the humanitarian aid sent by Israel, and that civilians did not receive the aid for free but were required to pay for it.”¹⁹⁰ N.A. said he recognised the humanitarian aid as originating in Israel because the labels on sacks of flour were in Hebrew.¹⁹¹
204. H.S., a resident of Jabaliya, provided similar information after he was arrested by the IDF during the Gaza Operation. H.S. spoke about the Hamas control of humanitarian aid arriving in the Gaza Strip from UNRWA – a situation existing since the Hamas rise to power in Gaza. As a result, he indicated, “Fatah activists do not receive any aid, and the food and equipment are transferred directly to Hamas activists and their supporters.”¹⁹²
205. On 20 January 2009, a number of armed men seized a Jordanian aid convoy after entering the Gaza Strip via Kerem Shalom Crossing Point. The Jordan Hashemite Charity Organisation (JHCO) aid convoy, which was expected by the UNRWA, was unloaded to non-Jordanian trucks after crossing King Hussein Bridge. The armed men opened fire at drivers after crossing Kerem Shalom crossing point and forced them to head to their own warehouses.¹⁹³
206. On 3 February 2009, UNRWA reported that Hamas armed assailants seized by force 3,500 blankets and 406 food parcels from its distribution centre at the Shati refugee camp. This action was strongly condemned by U.N. officials, who demanded an immediate return of the aid.¹⁹⁴ On 5 February 2009, UNRWA suspended all imports of aid into the Gaza Strip after 10 truckloads of flour (equivalent to 100 tons) and rice (equivalent to 200 tons)

¹⁸⁹ Fatah forum, 15 January 2009 (as cited in Intelligence and Terrorism Information Center, Evidence of Hamas Use of the Civilian Population as Human Shields, 4 February 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e055.pdf).

¹⁹⁰ See Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at <http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx>.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Armed men seize Jordanian aid in Gaza Strip*, Petra News Agency, 20 January 2009, available at <http://www.petra.gov.jo/Artical.aspx?Lng=1&Section=&Artical=83031>.

¹⁹⁴ Press Release, *UNRWA Condemns Confiscation of Gaza Aid and Demands its Immediate Return*, UNRWA, 4 February 2009, available at http://www.un.org/unrwa/news/releases/pr-2009/jer_4feb09.html. See also Intelligence and Terrorism Information Center, Tensions between Hamas and UNRWA following the theft of food and blankets and the Hamas takeover of a supply convoy, 9 February 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/hamas_e056.pdf.

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imported from Egypt for UNRWA were taken from the Palestinian side of the Kerem Shalom Crossing into Gaza.¹⁹⁵

207. All of these reports strongly suggest a pattern of Hamas actions designed to prevent international aid organisations from distributing much-needed humanitarian relief in an orderly fashion, solely because Hamas wished to be able to use the supplies to reward its supporters.
208. Hamas' interference with humanitarian relief efforts further underscores a complete lack of concern for the lives of ordinary Palestinians, on whose behalf Hamas purports to wage its terrorist campaign against Israel. Indeed, Hamas' wilful and repeated interference with the supply of essential goods and services to Gaza qualifies as a grave breach of the Law of Armed Conflict and a war crime under international law.

C. IDF's Conduct of the Operation and Procedures to Ensure Compliance with International Law

209. The inherent asymmetry between a State defending its civilians from terrorist attack and the terrorist organisations and other non-State actors raises acute dilemmas, challenges and intrinsic differences in assessing their conduct. Unlike Hamas and other terrorist organisations that Israel faces, Israel is firmly committed — as a matter of both policy and practice — to respecting its obligations under international law, including under the Law of Armed Conflict. As discussed further below, the IDF routinely undergo mandatory extensive training regimens designed to familiarise its soldiers with the laws of war, and actively involved military lawyers in advising commanders during both planning and operations, to ensure that they are aware of their obligations. Observance of the Law of Armed Conflict is also reflected in the IDF's specific orders and rules of engagement for the Gaza Operation; in the many specific precautions the IDF took during the Gaza Operation to try to minimise civilian harm; and in Israel's support for humanitarian efforts during the fighting. Finally, Israel's commitment to the rule of law with respect to the Gaza Operation is safeguarded by the extensive mechanisms it has in place, both within the IDF and outside it, to investigate alleged violations of the rules and ensure accountability for any such violations, should they occur.

¹⁹⁵ Press Release, *UNRWA Suspends Imports into Gaza Following Aid Confiscation*, UNRWA, 6 February 2009, available at http://www.un.org/unrwa/news/releases/pr-2009/jer_6feb09.html.

210. Each of the policies described in this section was instrumental in fulfilling IDF's obligations under the Law of Armed Conflict, as well as setting and achieving a high standard of protection for civilians during the Gaza Operation, often well in excess of the requirements of the Law of Armed Conflict. For instance, the in-depth training of IDF forces to respect the Law of Armed Conflict provided soldiers and commanders with the necessary knowledge and tools to make appropriate split-second decisions in the heat of battle, despite Hamas' attempts to deprive Israeli forces of options other than attacks that put civilians at risk. The involvement of military lawyers provided yet another layer of protection. The operational order in relation to the Gaza Operation clearly set forth the principles of distinction and proportionality, which all IDF forces were instructed to observe as an integral part of their battle orders. In practice, IDF forces imposed on themselves a multi-faceted system of early warnings, which made their operations far more complex and largely eliminated the element of surprise the IDF might have otherwise gained in its battle against Hamas. In many cases, IDF forces provided not one but multiple warnings prior to each attack and used sophisticated technology to confirm the departure of civilians and minimise collateral damage.
211. Ultimately, despite all the training, supervision and precautions, the actions of IDF forces during the Gaza Operation were not devoid of operational errors. Nevertheless, based on investigation thus far, such errors did not amount to violations of International Humanitarian Law. Israel is fully committed, however, to investigating all instances of alleged misconduct, to taking action to prosecute violations in appropriate cases and to making policy adjustments designed to prevent the repeat occurrence of unfortunate incidents. The multi-tier internal and external review procedures existing for such investigation under Israeli law are not only being fully utilised in connection with the Gaza Operation, they have been enhanced as described further below.

(1) IDF Training and Legal Supervision

(a) The IDF's Training System and Legal Supervision

212. The IDF takes substantial measures to instil awareness of and respect for international law in commanders and soldiers. The IDF Military Advocate General's Corps provides instruction in the Law of Armed Conflict to fighting forces predominantly through the IDF School of Military Law. The activities of the School in this regard are numerous and varied, including:
- Development of interactive computer software for instruction on rules of conduct in armed conflicts. Several thousand copies of this software have been distributed

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throughout the forces, and it is regularly used for training instructors in Command courses, at the IDF Tactical Command College and at most of the training bases in the IDF. Several militaries around the world have expressed interest in receiving the software for their internal training purposes.

- Development of interactive software for teaching the Law of Armed Conflict. This software contains an introduction to international law and deals with subjects such as the legality of weapons, targeting, methods of warfare, international criminal law and command responsibility.
- Wide distribution within the IDF of written materials, including leaflets for commanders, instruction booklets, placards and power-point presentations, dealing with offences in armed conflict, rules of conduct and other topics.
- Regular delivery of lectures and workshops on the Law of Armed Conflict and related rules of conduct, by officers of the IDF Law School, as an integral part of the IDF's training programs for senior and junior commanders. These include lectures and workshops at the IDF Officer Training School, the Staff and Command College, Senior Command Courses and the National Security College.
- Incorporating this information in the training of combat soldiers and integration of Law of Armed Conflict norms into IDF Combat Doctrine. For example, the IDF tactical field manual on low intensity conflicts with irregular forces contains a chapter on legal and ethical aspects of military operations.
- Offering academic courses in international law, the Law of Armed Conflict and belligerent occupation, command responsibility and norms of conduct, as part of the curriculum of the IDF Tactical Command College.
- Publication of an educational booklet on the Law of War. The latest edition of this booklet was published in 2006 and distributed to all unit commanders, senior officers, military colleges and the IDF Officers' Training School.
- Production of a Comparative Manual on the Law of Armed Conflict by the School of Military Law. Unique in kind, this is a comparative guide to the military manuals of Canada, Australia, Germany, United States and the Model Manual of the International

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Committee of the Red Cross, as well as the relevant international conventions relating to land, sea and air warfare.

213. The IDF also provides extensive training to inculcate moral norms in combat, based on “The Spirit of the IDF,” which sets forth the Code of Ethics for IDF soldiers. The document emphasises paramount values of “Human Life” and “Purity of Arms,” defined as follows:

“Human Life” – “IDF servicemen and women will act in a judicious and safe manner in all they do, out of recognition of the supreme value of human life.”

“Purity of Arms” – “IDF servicemen and women will use their weapons and force only for the purpose of their mission, only to the necessary extent and will maintain their humanity even during combat. IDF soldiers will not use their weapons and force to harm human beings who are not combatants or prisoners of war, and will do all in their power to avoid causing harm to their lives, bodies, dignity and property.”¹⁹⁶

214. The IDF provides educational programs for soldiers on human rights issues at all stages of military service, starting with Basic Training and Combat Specialty Training Courses through courses for senior commanders. Several thousand commanders participate in such workshops every year.
215. In addition, the IDF has established a team, led by Battalion Commanders, to identify areas for improvement in these matters and to make changes where necessary. The Education Corps also analyses incidents involving ethical issues and publishes its conclusions throughout the IDF.
216. Leading up to and during the recent operations in Gaza, the IDF Military Advocate General’s Corps provided legal advice on the Law of Armed Conflict to commanders at the General Staff, Regional Command and Divisional levels. The lawyers examined the legality of planned targets, participated in the operational planning process, helped direct humanitarian efforts, and took part in situation assessments, exercises and simulations. Legal advisors also assisted in drafting operational orders and procedures and in preparing legal annexes to such orders.

¹⁹⁶ Israel Defence Forces, Spirit of the IDF, available at <http://dover.idf.il/IDF/English/about/doctrine/ethics.htm>

217. IDF military lawyers were involved in advising commanders on international law aspects of the Gaza Operation. The IDF structure ensures that the IDF legal advisors can provide frank and professional advice. All legal advisers belong to the MAG Corps and are not subordinate to the commanders they advise. According to Israeli law, the head of legal services in the IDF, the Military Advocate General has an independent status outside the military hierarchy in relation to all legal issues. In principal legal aspects the MAG is subject to the guidance and supervision of Israel's Attorney-General and regularly consults with the Attorney General. In addition, IDF activities, including during active combat, as well as all MAG and Attorney General decisions are subject to judicial scrutiny and review by Israel's Supreme Court sitting as the High Court of Justice. As discussed below in Section V.C(5)(c), the High Court of Justice regularly reviews such activities and decisions, and intervenes in appropriate cases.

(b) Comparison with Other Systems of Training and Supervision

218. The training and supervision provided by the IDF with respect to the Law of Armed Conflict is similar to — and in some ways more extensive — than the training and supervision undertaken in other militaries of democratic States. Like Israel, many other countries provide their forces with training in the Law of Armed Conflict.¹⁹⁷ In addition, many countries have adopted training programs similar to Israel's in which forces are required not only to learn the applicable rules of the Law of Armed Conflict, but also to apply them in realistic scenarios.¹⁹⁸

¹⁹⁷ See, e.g., Canada: Law of Armed Conflict at the Operational and Tactical Levels, Joint Doctrine Manual B-GJ-005-104/FP-021 § 1503-04, 13 August 2001, available at [http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfd/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20\(13%20Aug%2001\).pdf](http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfd/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20(13%20Aug%2001).pdf) (Canadian manual noting the Law of Armed Conflict must be included in military instruction programs and that commanders have a responsibility to ensure the forces under their command “are aware of their responsibilities related to the LOAC and they behave in a manner consistent with the LOAC”); NATO: Are Rannem Johansen, *The Final Exam*, Joint Warfare Centre Media Center, 17 June 2004, available at <http://www.jwc.nato.int/article.php?articleID=37> (describing a training program in the Law of Armed Conflict provided to NATO forces); United States: IC-1 to U.S. Air Force Directive 51-401, *Training and Reporting to Ensure Compliance with the Law of Armed Conflict* ¶ 3.1 (17 December 2008) (requiring computer based training in the Law of Armed Conflict 90 days before being deployed); U.S. Air Force Policy Directive 51-4, *Compliance With the Law of Armed Conflict* ¶ 5.1 (16 April 1993) (requiring all members of the U.S. Air Force to receive instruction on the Law of Armed Conflict); Other Examples: News Release, *Switzerland: Senior Officers From 60 Countries Work On Integrating International Humanitarian Law into Military Operations*, ICRC, 6 August 2007, available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/promoting-ihl-news-060807> (describing the efforts of 60 European, American, African, Asian and Middle Eastern countries to integrate training of the Law of Armed Conflict into their military forces).

¹⁹⁸ See Col. Jody M. Prescott, *The Development of NATO EBAO Doctrine: Clausewitz's Theories and the Role of Law in an Evolving Approach to Operations*, 27 Penn. St. Int'l L. Rev. 125, 162 (2008) (“Many nations have developed complex and realistic situational training programs for soldiers that challenge them to apply what they have learned about the law of armed conflict in simulations involving living role players.”); Col. Jody M. Prescott, *Training*

[FOOTNOTE CONTINUED ON NEXT PAGE]

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219. NATO's International Security Assistance Force ("ISAF") in Afghanistan recently issued tactical directives regarding compliance with the Law of Armed Conflict which mirror many of the steps taken by Israel. One Directive, issued on 30 December 2008, directs all ISAF forces to ensure that uses of force be "proportionate" and that "the utmost of care should be taken to minimize any damage."¹⁹⁹ The Directive also requires military commanders to train their forces "to minimize the need to resort to deadly force" and to issue — as Israel did — repeated "general and specific warnings (visual and audible)" before using deadly force.²⁰⁰ A Directive issued 6 July 2009 calls for commanders to scrutinise, as Israel does, the use of close air support ("CAS") against residential compounds and carefully to "weigh the gain of using CAS against the cost of civilian casualties."²⁰¹ The Directive further instructs commanders to ensure "complete understanding at all levels — down to the most junior soldier" regarding the proper use of force.²⁰²
220. Moreover, lawyers in other countries play a similar role to the role held by legal advisers for the IDF, examining the legality of planned targets, providing legal advice to commanders both in the field and during the planning stages of operations, and drafting operational orders and procedures.²⁰³ For example, in the United Kingdom, legal advisers for the Army are normally available at the divisional level. In an air campaign, a legal adviser is normally on the staff of the theatre air commander.²⁰⁴ Many other countries do not have lawyers available and involved to the degree these countries and Israel do.

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

in the Law of Armed Conflict — A NATO Perspective, 7 J. Mil. Ethics 66, 68-71 (2008) (describing NATO training in the Law of Armed Conflict).

¹⁹⁹ See International Security Assistance Force, Tactical Directive (30 December 2008) ¶ 4(a).

²⁰⁰ *Id.* ¶ 4(c).

²⁰¹ International Security Assistance Force, Tactical Directive (6 July 2009).

²⁰² *Id.*

²⁰³ See United States: U.S. Chairman of the Joint Chiefs of Staff Instruction ("CJCSI") 5810.01C ¶ 4(b) (29 January 2008) (providing that "[a]t all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations, legal advisors will provide advice concerning law of war compliance"); Canada: Canadian Law of Armed Conflict at the Operational and Tactical Levels, Joint Doctrine Manual B-GJ-005-104/FP-021 § 1505 (10 June 2005), available at [http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfd/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20\(13%20Aug%2001\).pdf](http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfd/Pubs/CF%20Joint%20Doctrine%20Publications/CF%20Joint%20Doctrine%20-%20B-GJ-005-104%20FP-021%20-%20LOAC%20-%20EN%20(13%20Aug%2001).pdf) ("Canada has the obligation to ensure that legal advisors are available to advise military commanders on the application of the LOAC and the appropriate instruction to be given to the CF. Legal officers from within the Office of the Judge Advocate General fulfill this mandate."); see generally Rear Adm. Michael F. Lohr et al., Legal Support in War: The Role of Military Lawyers, 4 CHI. J. INT'L LAW 465 (2003) (describing the role of the U.S. Judge-Advocates with respect to the Law of Armed Conflict); Brig. Gen. Jerry S.T. Pitzul, Operational Law and the Legal Professional: A Canadian Perspective, 51 AIR FORCE L. REV. 311 (2001) (describing the role of the Canadian Forces Judge-Advocates with respect to the Law of Armed Conflict).

²⁰⁴ UK Ministry of Defence, *The Manual of the Law of Armed Conflict* 413 n.16 (1996).

221. Israel's system for ensuring compliance with international law compares favourably to those of other countries in another respect as well. Although the head of legal services within several other countries' militaries has a status entirely independent of the military hierarchy,²⁰⁵ the legal advisers in many other countries do not have such independent status.

(2) IDF Rules of Engagement During the Gaza Conflict

222. The IDF's emphasis on compliance with the Law of Armed Conflict was also directly incorporated into the rules of engagement for the Gaza Operation. The operational order for the Operation in Gaza specifically stated that "[a]ll IDF activities are subject to the principles and rules of international law." These rules and principles were further detailed in the order, which emphasised four guiding principles that applied in an integrated and cumulative manner: military necessity, distinction, proportionality and humanity:
- *Military Necessity*: "An attack shall be permitted as long as it is necessary to achieve a military purpose in the course of the military campaign," subject to the other principles and rules set forth.
 - *Distinction*: "Strikes shall be directed against military objectives and combatants only. It is absolutely prohibited to intentionally strike civilians or civilian objects (in contrast to incidental proportional harm)."
 - *Proportionality*: "A legitimate military objective may be attacked even if the strike would cause incidental harm to civilians or civilian objectives, provided that the expected harm to civilians or civilian objects, or a combination thereof, would not be excessive in relation to the military advantage anticipated."
 - *Humanity*: "When legitimate military target is attacked, superfluous suffering to enemy combatants shall be avoided. In this context, only legal weapons, which were approved by the relevant authorities within the IDF, shall be employed."

²⁰⁵ See Aitken Report, *An Investigation into Case of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004* ¶ 28 (25 January 2008) (describing the role of the Service Prosecuting Authority in the United Kingdom and its level of independence from the military hierarchy); David McNaim, *The Canadian Forces' Criminal Law Firm: A Blueprint for Independence*, 8 CAN. CRIM. L. REV. 329 (2004) (describing the institutional changes made in Canada to give its lawyers more independence from the chain of command).

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223. The legal section of the operational order further enumerates several absolute prohibitions.²⁰⁶ With respect to targeting decisions, the document set out the governing legal principles with regard to particular targets. These principles included the following:

- Only military targets shall be attacked.²⁰⁷
- Any attack against civilian objectives shall be prohibited.
- A “civilian objective” is any objective which is not a military target. In case of doubt, the forces are obliged to regard an object as civilian.
- When a civilian objective is used by the enemy for a military activity it loses its protection and immunity and becomes a legitimate military target. Nevertheless, when striking such a target, special care shall be taken to adhere to the principle of proportionality.
- The presence of civilians within a military objective or in its vicinity does not negate as such, the military character of the objective. Such a military objective may be attacked, subject to the principle of proportionality.
- A dual use objective may be attacked if reliable, conclusive and up-to-date information confirms that it serves the military activities of the enemy, and subject to the principle of proportionality. In case of doubt, such objective shall be presumed to be civilian.

224. The operational order confirmed that medical facilities and vehicles should be provided absolute protection from attack, unless they were being used by the enemy for military activities. Religious institutions were similarly protected from attack, unless they were being used for military purposes. Special precautions were to be taken when conducting military activities near U.N. or diplomatic premises, and ICRC staff were to be provided with as much freedom of movement and activity as possible, unless imperative military necessity required its limitation. Cultural property was protected from attack unless used for military activities or in the case of imperative military necessity.

²⁰⁶ The absolute prohibitions included plunder, starvation of the population, poisoning of water resources, torture, rape, the taking of hostages and the use of civilians as human shields, destruction of private property other than for military necessity, and perfidy.

²⁰⁷ Military targets were defined in terms similar to those used in Additional Protocol I, art. 52(2).

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225. The document further confirmed the importance of minimising incidental harm to civilians and civilian facilities. The operational order provided that “[a]s far as it is possible under the existing circumstances, civilian population in the vicinity of a legitimate military objective shall be warned before an attack. Such early warning may be avoided, if it would risk the operation or the forces.” In addition, “any attack on a legitimate target was to be planned to minimise collateral harm to civilians and civilian objectives, including by the determination of: the attack timing, the means of attack, the direction of attack, etc.” IDF forces were to use only weapons approved as legal by IDF authorities, and such weapons were to be employed in accordance with the specific limitations and precautions applicable to each of them in the concrete professional orders.
226. The order contained numerous other provisions designed to implement the Law of Armed Conflict. Among other things, the document provided that:
- Destruction of property shall be allowed only for imperative operational necessity and provided that the damage for the property would be proportional to the military advantage gained by the destruction. The destruction of property for deterrence purposes is forbidden.
 - The presence of enemy combatants among the civilian populations shall not deny the civilian character of the population.
 - Precautionary measures shall be employed to minimise the risk for civilians in the course of the hostilities.... Civilians shall not be compelled to take actions that would endanger them. They shall not be used as “human shields” to render military objectives or IDF forces immune from attack. Civilians shall not be held hostages. Forceful transfer of civilians is forbidden. Collective punishment is forbidden. Special protection shall be provided to the wounded and the sick, as well as to women, children and the elderly.
227. IDF’s rules of engagement strictly prohibit the use of civilians as human shields. Moreover, the Israel Supreme Court has ruled that use of civilians in any capacity for the purpose of military operations is unlawful, including the use of civilians to call terrorists hiding in buildings.²⁰⁸ Following this judgment, this latter practice has also been proscribed by IDF orders. The IDF is committed to enforcing this prohibition.
228. The IDF took a variety of measures to teach and instil awareness of these rules of engagement in commanders and soldiers. As described above, these rules were delivered

²⁰⁸ *Adalah - The Legal Center for Arab Minority Rights in Israel et. al. v. GOC Central Command, IDF, et. al.*, HCJ 3799/02 (6 October 2005).

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through lectures and workshops on the Law of Armed Conflict and related rules of conduct, by officers of the IDF Law School, as an integral part of the IDF's training programs for senior and junior commanders. In addition, they were included in leaflets for commanders, instruction booklets, placards and power-point presentations distributed within the IDF. In the course of the operation in Gaza, whenever the legal advisers posted in the Southern Command or the Division identified a potential gap in the implementation of the said rules of engagement, they initiated the distribution of clarifications to the fighting forces.

229. While IDF's rules of engagement were fully consistent with international law, IDF demonstrated its commitment to protecting civilians by issuing new instructions and orders in the course of the operation designed to further enhance and clarify these protections. Several instructions were issued by the Southern Command and the Regional Division to all combating forces in order to emphasise and clarify important rules of engagement, for instance, with regard to the protection of ambulances and humanitarian convoys.

(3) IDF Pursuit of Legitimate Military Targets During the Gaza Conflict

230. Consistent with its rules of engagement, IDF Forces sought to maintain an equilibrium between two competing considerations: military necessity and humanitarian considerations. In the course of the Gaza Operation, IDF's military necessities included first and foremost the prevention of rocket and mortar fire against Israel and Israelis, as well as the dismantling of terrorist infrastructure, but also the protection of IDF forces operating in the Gaza Strip.
231. As described above, during the Gaza Operation, IDF troops were exposed to considerable risk by the death traps Hamas had laid for them in urban areas, using the illegal tactics described in Section V.B above. These took the form of booby-trapped and mined neighbourhoods, buildings, roads and tunnels, as well as anti-tank rockets, automatic weapons, and sniper fire from concealed positions in civilian buildings and suicide bombers dressed as civilians. In such circumstances, the risk for the safety and security of IDF troops was extremely high, and was properly taken into account.
232. However, like all other considerations of military necessity, the protection of IDF troops did not override all other factors. In accordance with the IDF's operational plans and rules of engagement, military necessity was balanced against the fundamental obligations of the

Law of Armed Conflict, through the principles of distinction, proportionality, and the obligation to take appropriate precautions to minimise civilian harm.

(a) Targeting of Hamas Terrorist Infrastructure

233. Consistent with the principle of distinction, IDF forces attacked military targets directly connected to Hamas and other terrorist organisations' military activities against Israel. For instance, IDF forces targeted Hamas rocket launchers, weapons stockpiles, command and control facilities, weapons factories, explosives laboratories, training facilities and communications infrastructure. That these objects were often concealed or embedded in civilian facilities such as residential buildings, schools, or mosques did not render them immune from attack. In accordance with the Law of Armed Conflict, civilian facilities that served military purposes did not enjoy protection from attack. Thus, a residential building that doubled as an ammunition depot or military headquarters was a legitimate military target for attack.
234. Below is an illustrative account of military targets struck by the IDF during the operation:
- Hamas' bases, posts and headquarters:
 - *Izz al-Din al-Qassam Brigades and Executive Force headquarters in the northern Gaza Strip* (struck on 27 December): Hamas commandeered the compound after it took control of the Gaza Strip in June 2007. It served to store weapons and equipment, as well as housing armoured patrol cars (confiscated from the Palestinian security services operating in the Gaza Strip before the Hamas takeover). Hamas used two of the vehicles in the attack on the Kerem Shalom crossing on 19 April 2008, during which seven IDF soldiers were wounded. The headquarters also served as a base from which terrorist attacks were dispatched. The facility was also Hamas' main interrogation facility and a holding place for Fatah prisoners.
 - *Headquarters and weapons store of the Izz al-Din al-Qassam Brigades at Tel Zaatar, in the Jabaliya area* (struck on 27 December): Hamas took control of the compound during its violent confrontations with Fatah and thereafter used it for military training.
 - *Hamas' Al-Islam post in the northern Gaza Strip* (struck on 27 December): In the past the site served the Palestinian Preventive Intelligence. Hamas commandeered the building when it took over the Gaza Strip, and it serves as a base for the

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Executive Force, which was directly connected to Hamas' military wing, as described further in Section V.C(3)(b) below. It also served as a post for senior members of Hamas naval force and a facility for detaining and interrogating Fatah activists and individuals suspected of collaborating with Israel.

- *Hamas' main headquarters compound in Gaza City* (struck on 27 December): This compound served as Hamas' Gaza City headquarters, and the office of Ismail Haniya, head of the Hamas administration, is located in the compound. The headquarters also served as a point for Executive Force patrols to gather before they went out into the city. In addition, there were police cars and armoured patrol cars confiscated by Hamas when it took over the Gaza Strip.
- *Hamas post and training camp in the central Gaza Strip* (struck on 27 December): Hamas used the building to store weapons.
- *Hamas training camp in the southern Gaza Strip* (struck on 27 December): The camp also served as a central post for Hamas' auxiliary force and included a prison facility and weapons store.
- *Headquarters and weapons storage belonging to the Izz al-Din al-Qassam Brigades and the Special Force* (struck on 27 December): After Hamas took over the Gaza Strip it served as headquarters for its security services, housing a weapons store and offices. No civilians were living there. During fighting, Hamas positioned snipers in the building and rocket launchers on the roof.
- *An Izz al-Din al-Qassam Brigades training outpost in the Al-Maqusi towers in the northern Gaza Strip* (struck on 28 December): Hamas' military wing used this facility for training.
- *Ismail Haniyah's office in the Hamas compound in Gaza City* (struck on 31 December): The office of Ismail Haniyah, attacked by Israeli Air Force on the nights of 30-31 December, was used for planning, supporting, and funding terrorist activities against Israel.
- Hamas' armament production and storage sites:
 - *Research and development centre in the Islamic University in Gaza* (struck on 28 December): Hamas used the site to develop rockets with improved launching range.

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- Throughout the operation, the IAF attacked dozens of workshops and weapon stores, many of them located in the houses of Hamas operatives and public buildings (including mosques).
- Rocket and mortar launch sites:
 - Throughout the operation, the IAF attacked areas regularly used to launch rockets and mortars against Israel to prevent the arrival of launch squads to those areas. See, for instance, a video of a rocket launcher ready for firing that was struck on 13 January.²⁰⁹
- Smuggling tunnels:
 - Throughout the operation, IDF attacked dozens of tunnels along the Philadelphi route used for smuggling of arms and ammunition for terrorist attacks against Israel from Sinai to the Gaza Strip. They were also used to smuggle terrorist operatives from Egypt into the Gaza Strip and vice versa.
- Mosques used by Hamas for military purposes:
 - *A Mosque in the Tel al-Hawa neighbourhood of Gaza City that served as a storehouse for armaments* (struck on 31 December): The mosque served as an arms storage facility and a launching site for terrorist activity. The strike caused a long series of secondary explosions from armaments and ammunition that were stored in the mosque (including rockets, some of which were long-range Grad rockets). The raid took place following information received prior to the attack, indicating that many fighting operations were being launched out of and in the vicinity of the mosque. For instance, the mosque was used for storing weapons, firing rockets into Israeli territory (including fire on the morning of 31 December), and providing a hiding place for terrorist operatives.
 - *Al-Khulafa mosque in Jabaliya* (struck on 1 January): The mosque was a focal point of the Izz al-Din al-Qassam Brigades' terrorist activities. It served as an important Hamas operations room where organisation meetings were held and from which operatives were dispatched to carry out terrorist attacks against Israel. In addition, it contained a rocket arsenal which included long-range standard Grad rockets. The strike on the mosque was followed by a long series of secondary

²⁰⁹ Intelligence and Terrorism Information Center, video available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/tkifot_af_eng.htm.

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explosions, causing the building to burn for a long time, and indicating that a large quantity of hidden weapons and ammunition had been stockpiled in it.

235. It should be noted that Israeli forces have come under criticism from various international organisations for attacking a number of Hamas targets, such as various “ministries” operated by Hamas, which were alleged to be civilian in nature. While Hamas operates ministries and is in charge of a variety of administrative and traditionally governmental functions in the Gaza Strip, it still remains a terrorist organisation. Many of the ostensibly civilian elements of its regime are in reality active components of its terrorist and military efforts. Indeed, Hamas does not separate its civilian and military activities in the manner in which a legitimate government might. Instead, Hamas uses apparatuses under its control, including quasi-governmental institutions, to promote its terrorist activity.
236. IDF took account of these realities in carrying out attacks against a number of Hamas ministries during the Gaza Operation. With respect to each particular target, IDF made the determination that the attacks were lawful under international law. Finally, it is important to point out that all of these strikes were carefully planned and executed in a manner that minimised the risk to civilians.

(b) Targeting of Terrorist Operatives

237. In addition to Hamas terrorist infrastructure, the military operatives of Hamas and other terrorist organisations were also legitimate targets for attack by the IDF. Hamas’ military forces in Gaza were comprised mainly of the Izz al-Din al-Qassam Brigades, but also of other forces making up the so-called “internal security” apparatus, which perform significant military functions during intense fighting with Israel. Due to their military functions, these internal security forces were not accorded the immunity from attack generally granted to civilians.
238. Whereas members of a civilian police force that is *solely* a civilian police force, who have no combat function are not considered combatants under the Law of Armed Conflict, international law recognises that this principle does not apply where police are part of the armed forces of a party.²¹⁰ In those circumstances, they may constitute a legitimate military target. In other words, the status of the Palestinian “police” under the Law of

²¹⁰ See, e.g., THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 307 (Dieter Fleck and Michael Bothe, eds., Oxford University Press 1995) (“Along with the combatant status attained through the incorporation into the armed forces, these (police) forces also become a military target (as defined by art. 52, ¶ 2 API) and are therefore subject to armed attacks by the opposing party to the conflict just like any other unit in the armed forces.”)

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Armed Conflict depends on whether they fulfilled combat functions in the course of the armed conflict. The evidence thus far is compelling that they are.

239. Hamas formed the Executive Force in May 2006 as a militia force loyal to Hamas and opposed to the security apparatus of the Fatah-led Palestinian Authority. Hamas drew this paramilitary force largely from its military wing, the Izz al-Din al-Qassam Brigades, and armed the members with anti-tank missiles, mortars, machine guns and grenades. The newly recruited commanders and subordinates were not obliged to give up their military wing affiliation, and continued to operate simultaneously in both functions.
240. After a series of armed clashes, Palestinian President Mahmoud Abbas outlawed the Executive Force in January 2007, accusing it of “lawlessness and assassinations.”²¹¹ Nevertheless, Hamas continued building the force and deployed it to conduct a bloody coup to replace the Palestinian Authority in Gaza several months later.
241. At that point, Hamas restructured the Executive Force and subdivided it into several units, including the “police.” The newly established police force thereafter assumed many traditional law enforcement functions, to the extent enforcing the unlawful rule of a terrorist organisation over a population could be termed “law enforcement.” As the leader of the Executive Force emphasised in an August 2007 interview, however, the force’s members were also “resistance fighters,”²¹² a common term for Hamas’ military wing. Their weaponry continued to include machine guns and anti-tank weapons — not the tools of a regular civilian police force.

²¹¹ Richard Boudreaux, *Abbas outlaws Hamas’ paramilitary Executive Force*, The Boston Globe, 7 January 2007, available at http://www.boston.com/news/world/middleeast/articles/2007/01/07/abbas_outlaws_hamass_paramilitary_executive_force/.

²¹² International Middle East Media Center, *Interview with the leader of the Hamas-formed Executive Force*, Palestine Newspaper, 17 August 2007, available at <http://www.imemc.org/article/49939>.

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- ▶ Left: The Hamas Executive Force (International Middle East Media Cener, August 2007); Right: A photo of Hamas Executive Force operative shouldering a home-made anti-tank missile launcher (www.palissue.com, 13 June 2007)

242. After its transformation, the former Executive Force continued to be closely integrated with — although not formally part of — the al-Qassam Brigades. At times, the line between the two would disappear entirely, such as in the photograph below in which members of the al-Qassam Brigades pose on top of a police vehicle during training operations. As documented by the Intelligence and Terrorism Information Center and, as illustrated further below, many members of the internal security services also served directly in the al-Qassam Brigades.²¹³



- ▶ Armed Izz al-Din al-Qassam Brigades operatives standing on a police car during trainings

²¹³ Intelligence and Terrorism Information Center, *Mounting evidence indicates that during Operation Cast Lead (and in ordinary times) members of Hamas' internal security forces served as commanders and operatives in Hamas' military wing (Izz al-Din al-Qassam Brigades)*, 24 March 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e067.htm.

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243. Even more crucially, as noted in an April 2008 Report by the Intelligence and Terrorism Information Center, the operational military plan for hostilities with Israel was that:

“The operatives of the internal security system and of the other Palestinian terrorist organizations would integrate into the Izzedine al-Qassam Brigades, program for defence should the IDF enter the Gaza Strip.”²¹⁴

244. Indeed, several days before the ground phase of the Gaza Operation began, Hamas police spokesman Islam Shahwan said that the Hamas leadership had instructed police to fight against IDF forces. He added that senior police officers had drawn up action plans and that the police and the security forces were on high alert for a ground assault.²¹⁵ He further noted that “the police forces had received . . . instructions from the leadership to fight the enemy in [the event of] an invasion” into the Gaza Strip.²¹⁶

245. It appears that the police in fact followed these instructions. In an interview about the functioning of the police during the Gaza Operation, Hamas police chief Jamal Jarah said that “[t]he police was able to defend the resistance home front by tracking down agents and arresting them” and that “the police took part [in the fighting] alongside the resistance and helped it defend the soil of Gaza.”²¹⁷ Other leaders of Hamas’ internal security forces made similar statements. Hussein Abu Azra, commander of National Security in the Gaza Strip, for example, promised that his forces would resist “any act of aggression against the Gaza Strip” and that they would defend the civilians using all means possible.”²¹⁸ All of these statements confirm the reality that Hamas intended to, and did, in fact, employ its internal security forces for military activities during the Gaza Operation. Under the Law of Armed Conflict, those security forces therefore are regarded for the purposes of the conduct of hostilities as combatants, and as combatants, they are legitimate military targets.

246. This collective role of the Gaza “police” as an integral part of Hamas armed forces is further evidenced by the fact that many Gaza “policemen” were also members of the al-

²¹⁴ Intelligence and Terrorism Information Center, *Hamas Military Buildup in the Gaza Strip*, April 2008, available at <http://www.security-review.net/News/Middle-East/Israel-and-Palestinian-territories/Hamas-Military-Strength-April-2008>.

²¹⁵ Intelligence and Terrorism Information Center, *Mounting evidence indicates that during Operation Cast Lead (and in ordinary times) members of Hamas’ internal security forces served as commanders and operatives in Hamas’ military wing (Izz al-Din al-Qassam Brigades)*, 24 March 2009, available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/html/hamas_e067.htm.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

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Qassam Brigades. The following photographs provide compelling evidence that dual membership in the al-Qassam Brigades and the police force was common, and that police officers killed during the Gaza Operation were hailed in obituaries as “martyrs of al-Qassam.” They show obituaries for policemen as martyrs of the Izz al-Din al-Qassam Brigades.



- ▶ Left: Shhade Fathi al-Kurd, “a commander and martyr of [Izz al-Din] al-Qassam” “Yavne Battalion artillery unit”; Right: Fathi al-Kurd photographed in police uniform; however, the text reads, “A commander and martyr of [Izz al-Din] Al-Qassam”



- ▶ Izz al-Din al-Qassam Brigades operative Muhammad Ibrahim Abu Sha'er, killed on 6 January 2009 in the Gaza Operation. Left: the operative's body, with a headband saying “Al-Qassam Brigades.” Right: the operative, called “a martyr of Al-Qassam” appears in the uniform of the Rapid Intervention Force, one of the internal security forces. According to the Hamas forum, he belonged to Hamas' artillery unit (Source: PALDF, 7 January 2009)

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- Left: An obituary for Adel Abu Awn, commander of the sniper unit in the northern Radwan brigade of the Izz al-Din al-Qassam Brigades, who was also an officer in the Palestinian police. The poster shows Adel Abu Awn in police uniform, proof of his double affiliation (Source: Hamas forum, 20 January 2009). Right: the original photograph of the poster, published on the Interior Ministry website July 2008.



- Left: Muhammad Yahya Muhanna, commander in the Izz al-Din al-Qassam Brigades. Right: Muhammad Yahya Muhanna in Gaza police uniform (Source: PALDF, 30 December 2008)

247. In fact, there is evidence that an overwhelming majority of the police forces were also members of the Hamas military wing or activists of Hamas or other terrorist organisations. A recent study has reviewed a list of all the internal security services members that Hamas reported killed during the Gaza Operation — consisting of 245 names in total. It found that 75.2 percent were Hamas activists (mostly members of the al-Qassam Brigades), and the total number of terrorist activists and fighters (including members of other terrorist groups operating in Gaza) from among the number of fatal casualties of the Palestinian security forces was 311, or 90.7 percent.²¹⁹ In other words, more than nine out of every ten

²¹⁹ Jonathan Dahoah-Halevi, *Fatal Casualties of the Palestinian Security Forces — Myth vs. Reality* (24 May 2009), available in Hebrew at <http://www.jcpa.org.il/JCPAHeb/Templates/showpage.asp?FID=594&DBID=1&LNGID=2&TMID=99&IID=22712>.

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alleged “civilian police” were found to be armed terrorist activists and combatants directly engaged in hostilities against Israel.

248. This evidence demonstrates that considering Hamas “police” casualties as civilians is inappropriate. The reality is that the internal security services have been and continue to be a cadre of terrorist operatives armed with a variety of heavy weapons including anti-tank missile launchers, with standing orders to fight Israeli forces. Under the Law of Armed Conflict, Israel is permitted to target such forces and their bases of operation.

(4) IDF Precautions During the Gaza Conflict

249. In accordance with the requirement to take precautionary measures when feasible to minimise harm to civilians in pursuing legitimate military objectives, the IDF planned its attacks carefully. Despite the enormous difficulties posed by Hamas’ tactics, the IDF’s efforts included not only a range of precautions related to targeting and munitions, but also an extensive system of warnings, including general advance warnings to the civilian population in the area of military operations, regional warnings and specific warnings to civilians in or near military targets (such as buildings used by terrorists for storing weapons or launching attacks). Indeed, Israel has been commended for its extensive precautions during the Gaza Operation.²²⁰

(a) Precautions Regarding Targeting and Munitions

250. Given the incessant rocket attacks on Israeli civilians from Gaza, Israel had no real choice but to pursue Hamas and fight such terrorism. It was clear to the IDF in planning the Operation that it would need to exercise great care given the population density of Gaza, and Hamas’ tactic of purposely hiding (and committing acts of terrorism against Israeli civilians from) within that population. Advance planning was possible for some of the targets and attacks, but it was also clear that, as in all combat situations, commanders and soldiers in the field would have to make spontaneous decisions, based on Hamas actions at a given location and time.
251. For attacks planned in advance, the IDF’s efforts to implement the principles of distinction and proportionality began at the initial planning stage, where each operation and target was considered on an individual basis in order to ensure that it met the requirements of

²²⁰ As British Colonel (ret.) Richard Kemp commented on the BBC, “I don’t think there has ever been a time in the history of warfare when any army has made more efforts to reduce civilian casualties and deaths of innocent people than the IDF is doing today in Gaza.” *BBC: Former British Army Colonel Richard Kemp Discusses IDF Gaza Ops*, 18 January 2009, available at <http://www.youtube.com/watch?v=WssrKJ3lqcw>.

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distinction, proportionality and precautions in attack. Targeting decisions which were planned in advance were reviewed by several IDF authorities, including MAG officers. The decision-making process involved an in-depth analysis of all relevant considerations, which was based upon the available intelligence, including the operational needs, the anticipated damage to property and sensitive sites, the anticipated harm to civilians, and so on. Whenever possible, the IDF verified the accuracy of the information on the target by cross-checking updated and independent intelligence sources. In this process, the IDF disapproved some, approved others only under certain conditions, such as the time of the attack, the type of weapons used (in order to achieve the military goal while reducing collateral damage), or required precautions prior to attack. On numerous occasions the process resulted in rejection of proposed military operations, where, for example, the available intelligence regarding the proposed target was not sufficiently reliable or up-to-date, or where the likelihood of collateral damage to civilians and their property was considered excessive in relation to the military advantage anticipated.

252. Even where a target was authorised in advance, the IDF examined proportionality again immediately prior to the attack on the basis of real time data available to the person executing the attack. Thus, for example, when a pilot approaching a target identified the potential for disproportionate collateral damage, he or she would refrain from attacking the target or even — when possible — would divert a missile already fired, as occurred occasionally during the Gaza Operation.²²¹ These rules of engagement applied fully during the Gaza Operation.
253. Certain attacks could not be planned in advance, but became imperative in real time during combat, such as when ground forces came under fire from Hamas operatives. However, the commanders authorised to approve such targeting decisions act under IDF orders which, as discussed in Section V.C(2) above, set forth the rules of distinction and proportionality and emphasise the importance of appropriate precautions. Thus, pursuant to IDF standing orders, commanders in the field are expected to carefully assess both the expected military gain and the potential of collateral injury to civilians and civilian property in the area. In making this determination, the commander considers numerous factors. In assessing military advantage, for example, the commander will take into account the degree and immediacy of the threat posed by the target to the safety and security of Israeli civilians; the contribution of the target's destruction towards the accomplishment of the mission; and the threat to IDF personnel. In assessing possible

²²¹ See IDF Spokesperson Unit, *IDF VLOG: Israeli Airstrikes Aborted to Protect Civilians*, 14 January 2009, available at <http://idfspokesperson.com/2009/01/14/idf-vlog-israeli-airstrikes-aborted-to-protect-civilians/>.

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collateral damage, the commander will consider the number of civilians near the target; whether they are exposed or protected; the expected radius of the strike's lethal effects; and whether or not the attack can be delayed or carried out effectively with a more precise or less powerful weapon in the prevailing circumstances.

254. Second, when possible, the IDF used (in real time) updated and precise intelligence available regarding target identification and the risk of incidental civilian harm. When necessary, it also cross checked intelligence sources before commencing attacks, even in cases in which delaying fire entailed additional risk to both Israeli civilians and IDF forces.
255. Third, the IDF gave considerable care to the choice of munitions. Wherever possible, and even though it is not strictly required under international law, the IDF conducted pinpoint surgical aerial strikes, using precision guided munitions. Several missiles were diverted moments before impact for this reason. In total, about 80 percent of the air missiles fired by Israel were precision guided.
256. Fourth, the IDF employed various means for monitoring the presence of civilians in areas of operation, where possible, including aerial surveillance, before conducting aerial attacks. The IDF aborted or postponed attacks on Hamas personnel and targets when it appeared that civilians were at risk, at the expense of attaining military advantage. In fact, the IDF has released video footage conclusively demonstrating the diversion of missiles during the Gaza Operation.²²²
257. Fifth, in several cases, military targets were destroyed from the ground using mechanical equipment, rather than bombed from the air, in order to minimise collateral damage. This approach enabled the orderly evacuation of civilians and kept damage to surrounding areas at a minimum, although it exposed IDF personnel to additional risk.
258. Sixth, to the extent feasible, the IDF timed attacks on targets so as to cause minimum collateral damage. For example, buildings normally occupied only during daylight hours, and military targets which were located in proximity to such buildings, were struck at night. Similarly, moving vehicles were planned to be hit when they had travelled as far away as possible from civilian bystanders.
259. Finally, the IDF took precautions regarding sensitive sites. The IDF's operational plans and rules of engagement order special precautions with regard to military activity in

²²²*Id.*

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proximity to United Nations and Red Cross facilities (of which there are several hundred in Gaza), hospitals, religious sites and educational institutions — a total of almost 1,900 sensitive sites in the Gaza Strip. All these sensitive sites were clearly marked in advance on IDF operational maps and aerial photographs, according to the information available to the IDF, as provided by the different organisations. The IDF distributed these maps at all levels of command, and gave clear orders regarding the protection of facilities and vehicles of this sort. The IDF set up a special Civil Administration situation room and a centre for humanitarian coordination to facilitate cooperation between the IDF and the U.N., the Red Cross and other international organisations.

260. In spite of these numerous precautionary measures, there is no way in a rapidly changing and complex battlefield environment to absolutely guarantee the safety of all civilians, civilian objects and sensitive sites. As explained in Sections V.B(2) and V.B(3), Hamas and the other terrorist organisations operating in the Gaza Strip placed the civilian population and the facilities used by the U.N. and other international organisations and humanitarian agencies in substantial danger. With the knowledge that the IDF limits its operations in the vicinity of such facilities, Hamas terrorists intentionally conducted military activity, including the launching of rockets and mortar shells, adjacent to them. Similarly, as discussed above, Hamas terrorists located headquarters, bases, weapon storage facilities and other terrorist infrastructure close to the sensitive facilities of the U.N., Red Cross and other international organisations and even inside sensitive sites, such as Shifa hospital.
261. This mode of operation created complex operational, moral and legal challenges to the IDF, which frequently had to reconcile its commitment to minimise the risk to civilians and provide special protection to sensitive sites with military imperatives, such as the prevention of rocket launches from areas adjacent to schools and hospitals or the protection of troops under attack by Hamas terrorists operating from the vicinity of U.N. facilities. In some cases, the IDF refrained from military activities because of potential significant harm to sensitive sites. For example, the IDF did not attack Shifa hospital even though it served as the main headquarters for Hamas military leadership.²²³ In other cases where it was necessary to proceed with military operations despite the risk to sensitive sites, the IDF took precautions to minimise the risk for harm.

²²³ A Hamas activist captured by IDF forces during the operation confirmed during his interrogation that senior Hamas members were hiding out in Shifa Hospital during the Gaza Operation. See Israel Security Agency, Selected Examples of Interrogations Following Operation Cast Lead, available at <http://www.shabak.gov.il/English/EnTerrorData/Archive/Operation/Pages/cast-lead-Interrogations.aspx>; see also Amir Mizroch, *Dichter: Hamas salaries paid at Shifa Hospital*, Jerusalem Post, 12 January 2009, available at <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1231424936164>.

(b) Advance Notice to Civilians

262. The IDF also made special efforts to notify civilians of impending IDF operations and to instruct them how to avoid harm. The early warnings system was comprised of several layers that were complementary to each other.
263. First, general warnings were used, calling on civilians to stay away from sites where Hamas was conducting combat activities. In addition, regional warnings were distributed in certain areas, calling on civilians to leave those areas before IDF forces operated in them. Efforts were made to include in these warnings sufficient information to the residents, including a timeframe for the evacuation and designated specific routes for this purpose leading to safe areas. Far from having no place to flee, residents could — and the vast majority did — move to safe locations. Finally, specific warnings were issued to residents of particular buildings before attack.
264. Throughout the Gaza Operation, the IDF employed a variety of methods to communicate warnings effectively. The warning techniques included:
- *Radio Broadcasts and Phone Calls:* The IDF conveyed instructions and advance warnings to residents by local radio broadcasts with IDF announcements and by about 165,000 phone calls. This involved specific notices as well as a daily news broadcast (the latter from 31 December onwards).
 - *Dropping of Leaflets:* During the Gaza Operation, the IDF dropped a total of some 2,500,000 leaflets of various kinds in the Gaza Strip. Some of the leaflets warned civilians to distance themselves from military targets, including buildings containing weapons, ammunitions or tunnels, or areas where terrorist activity was being conducted.²²⁴ Other leaflets directed residents to leave a particular location and move to a safe zone by a certain route and within a defined period of time. Such leaflets were distributed, for instance, in the northern Gaza neighbourhood of Sajaiya.²²⁵

²²⁴ For example, residents of Rafah were provided with a general leaflet, stating that “[t]he IDF is conducting operations against groups who are engaged in acts of terrorism against the State of Israel. The IDF will strike and destroy any location or building containing weapons, ammunition or a tunnel. As of the distribution of this notice, the life of anyone present in a building containing weapons, ammunition or a tunnel is in danger and he should leave the location immediately for his own and his family’s safety!”

²²⁵ The text of the Sajaiya leaflet was as follows:

To the Residents of the Sajaiya Neighbourhood

The IDF continues to intensify its operations against Hamas terrorism and will attack any location in the Gaza Strip where terrorist operatives, tunnels or weapons are to be found. All residents of the Sajaiya Neighbourhood must leave their homes and move towards the Old City to the other

[FOOTNOTE CONTINUED ON NEXT PAGE]

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While warnings were a significant tool to reduce the likelihood of civilian casualties, IDF forces did not consider the distribution of leaflets alone as sufficient to presume the absence of civilians at the relevant locations.

- *Specific Warnings Before Attacks:* In addition to the above, the IDF made specific telephone calls just before an attack was about to take place, informing residents at risk about the upcoming strike and urging them to leave the place. In certain instances, although such warnings were made, the civilians chose to stay. In such cases, the IDF made even greater efforts to avoid civilian casualties and minimise collateral damage by firing *warning shots from light weapons that hit the roofs* of the designated targets, before proceeding with the strike. These warnings were accompanied by real-time surveillance in order to assess the presence of civilians in the designated military target, despite the advance warnings. Accordingly, the commander in charge assessed whether the collateral damage anticipated, including to those who chose to stay at the premises, was not excessive in relation to the military advantage anticipated. The specific warnings were generally effective. Several such incidents are discussed in Section V.D(2), including one in which all residents of a four-story apartment building safely evacuated following a series of warnings, and another in which surveillance confirmed the evacuation of a group of residents, although apparently one family remained despite the extensive warnings.

265. While the warning systems implemented by the IDF did not provide a 100 percent guarantee against civilian casualties, they were, in fact, highly effective. Aerial video surveillance by IDF forces confirmed the departure of civilians from targeted areas prior to the attack as a direct result of the warnings.

(c) Humanitarian Efforts

266. At the same time that the IDF was taking substantial precautions to minimise civilian casualties, it was also implementing a far-reaching effort to ensure that the humanitarian

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

side of Salah A'Din Road, with effect as of the distribution of this leaflet and by no later than 6 hours after the distribution of this leaflet.

These instructions are in force until further notice. Adherence to IDF instructions has prevented unnecessary casualties in the past.

Please continue to follow IDF instructions for your own safety.

IDF Command

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needs of the civilian population in Gaza were met during the Gaza Operation. This humanitarian effort included several components:

- Ensuring continuous supplies of humanitarian aid through the crossing points, such as food, medical supplies and fuel.
- Coordination of evacuations and other humanitarian movements within the Gaza Strip and between Gaza and Israel.
- Unilateral suspensions of military operations to enable re-supply of the population and humanitarian relief activities.
- Ensuring the functioning of essential infrastructure in the Gaza Strip.

267. A central aspect of the IDF humanitarian effort was coordination with the various humanitarian agencies and organisations. Humanitarian facilities were marked on IDF operational maps and aerial photographs according to information provided by the various organisations in advance. Furthermore, a joint coordination map was prepared, to create a common language for the IDF and the international organisations operating in Gaza.
268. On 23 December 2008, on the eve of the operation in Gaza, the Ministry of Foreign Affairs held a specific meeting with representatives of the ICRC and other organisations in order to establish clear channels of cooperation, and to ensure the continuing flow of humanitarian supply and medical assistance to Gaza during the operation. In addition, immediately upon the commencement of the Gaza Operation, the then Foreign Minister, Tzipi Livni, held a special high level meeting with representatives of ICRC, United Nations Truce Supervision Organization (“UNTSO”), UNRWA, United States Agency for International Development (“USAID”), World Food Program (“WFP”) and the EU, in order to assess the needs of these organisations for the benefit of the civilian population in Gaza. Furthermore, as discussed below, a Humanitarian Coordinating cell was established during the operation in Gaza, providing real-time assistance and coordination to international organisations *vis-a-vis* the IDF and the Israeli authorities.
269. During the Gaza Operation itself, the Gaza Coordination and Liaison Administration (“CLA”) operated a 24 hour operations room tasked with communicating with the IDF and international organisations to deal with real time problems and requests. The CLA coordinated close to 500 movements of international organisations’ vehicles and convoys during the operation. In addition, a special Humanitarian Coordination Centre (“HCC”)

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was established for enhanced coordination with representatives of the international organisations working in Gaza. Representatives of the United Nations Office for the Coordination of Humanitarian Affairs (“OCHA”), UNRWA, ICRC, WFP and other international organisations met on a daily basis with IDF representatives to coordinate the entry of humanitarian aid into Gaza. There were 120 humanitarian support and liaison officers, trained in advance and deployed at all levels of field command, in order to manage implementation of the humanitarian coordination and to serve as advisers to the military commanders on humanitarian and coordination issues.

270. The IDF maintained communication with the Civil Affairs Committee of the Palestinian Authority as well as with members of the Palestinian private sector to coordinate supplies of goods and humanitarian assistance. In addition, the IDF maintained contact with the Palestinian Electricity, Water and Sewage and Communications Authorities in Ramallah and their crews in Gaza, in order to coordinate the functioning of essential utilities during the Gaza Operation.
271. A total of 1,511 trucks carrying 37,162 tons of supplies entered the Gaza Strip from Israel through the Kerem Shalom and Karni crossings from the commencement of the Gaza Operation and for its duration, as detailed below:

Kerem Shalom Crossing Humanitarian Supplies		
Item	No of Trucks	Tons
Flour	525	14,208
Rice	50	1,283
Sugar	77	2,356
Oil	56	1,308
Dairy Products	64	1,117
Legumes	15	477
Animal Feed	119	3,495
Medicines and Medical Equipment	119	1,038
Blankets	24	160
Other	364	7,824
Total	1,413	33,266

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Karni Crossing Humanitarian Supplies		
Item	No of Trucks	Tons
Animal Feed	41	1,638
Corn	4	162
Soya	1	37
Wheat	50	1,975
Barley	2	84
Total	98	3,896

Transfers of Fuels and Gas to Gaza	
Diesel for Gaza Power Station	1,535,750 litres
Diesel for Transport to UNRWA	188,000 litres
Diesel for Transport	96,000 litres
Diesel to UNRWA	282, 000 litres
Cooking Gas	234 tons
Diesel for Heating	1,711,000 litres

272. The IDF coordinated the entry of 706 trucks carrying donations from international organisations and various countries as follows:

- UNRWA – 10; WFP – 25; United Nations Children’s Fund (“UNICEF”) – 9; Médecins Sans Frontières (“MSF”) – 1; Médecins Du Monde (“MDM”) – 1; Other Organisations – 7; JHCO – 116; Egypt – 43; Turkey – 16; Greece – 2; Italy – 1

273. The IDF coordinated the entry of consignments of medical supplies received from various sources during the Gaza Operation as follows:

- UNRWA – 5,606; WFP – 3,611; ICRC – 327; World Health Organisation (“WHO”) – 300; UNICEF – 166; MDM – 6; MSF – 2; JHCO – 2538; Egypt – 1183; Turkey – 273; Greece – 26; Italy – 17; Other – 58

274. In addition, a special medical coordination centre was set up in the Gaza District CLA, under an officer with the rank of Major, which dealt with assistance to civilians in danger and with evacuation of the wounded and dead from areas of hostilities. This medical situation room coordinated 150 different requests during the Gaza Operation, and all professional decisions were made by a medical doctor. As part of these efforts, the following measures were taken:

- 382 wounded Palestinians were extracted from areas of hostilities.

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- 1,150 Palestinian civilians were evacuated from areas of hostilities.
 - 68 chronically ill patients left Gaza via Erez Crossing for treatment in Israel/Jordan.
 - A field clinic was set up at the Erez Crossing.
 - 20 ambulances entered Gaza from Israel - donations from Turkey and Jordan and reinforcements from Red Crescent in West Bank (10 additional ambulances were brought in by the Red Cross after the operation).
 - 37 international aid workers and medical personnel entered Gaza via the Erez Crossing.
 - 17 fire engines were sent to deal with fires.
 - Coordination of passage from North to South within the Gaza Strip of 500 trucks and 131 ambulances.
 - In addition, several hundred humanitarian journeys were made between Egypt and Gaza through the Rafah crossing including the entry to Gaza of 25 ambulances.
275. The IDF also set up and manned (24 hours a day, 7 days a week) an Infrastructure Coordination Centre to monitor the situation in Gaza, identify needs and coordinate repairs to infrastructure in areas of hostilities. This centre handled the following matters:
- 38 infrastructure repairs were carried out by technicians in areas of hostilities.
 - Direct communication was maintained between the Palestinian Energy Authority and the Israel Electric Corporation to identify problems and fix them as soon as possible, including at risk to lives of Israeli technicians. Although several of the power lines supplying electricity from Israel to Gaza were damaged in the fighting, as of 15 January 2009, nine of the ten lines were operational.
 - The two power lines bringing electricity from Egypt into Gaza were operational.
 - During the operation, substantial amounts of industrial diesel for the Gaza power station were transferred into Gaza from Israel. The amount of diesel was reduced after an explosive tunnel was discovered near the Nahal-Oz fuel terminal. However, in spite

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of the risk, the supply of industrial diesel was renewed through the Kerem Shalom crossing.

- In addition, 200,000 litres of automotive diesel, 234 tons of cooking gas, hygiene and water purification kits and water bottles were brought into Gaza from Israel.

276. Finally, beginning 7 January 2009, the IDF unilaterally suspended military operations for at least three hours each day (“humanitarian pauses”), to enable re-supply of the population and other humanitarian relief activities. As discussed in Section V.B(7) above, while the IDF carefully observed the humanitarian pauses, Hamas abused them to launch rockets and fire mortars into Israel. During the period between 8 and 17 January 2009, Hamas fired a total of 44 rockets and mortars at Israel during humanitarian pauses.

277. Naturally, humanitarian efforts during active warfare and hostilities can always be improved. Civilian populations inevitably and tragically suffer during a time of armed combat, particularly where the combat operations take place in densely populated urban areas. This is further exacerbated when the humanitarian efforts of one party are impeded by the activities of the other party, which wishes to create a humanitarian crisis. It is important to understand that, in contrast to Hamas’ actions which jeopardised the civilian populations of Gaza and obstructed the distribution of humanitarian supplies, Israel put into place significant systems and resources to try to ensure that the humanitarian needs of the civilian population were met.

278. IDF’s efforts to comply with its humanitarian obligations during the Gaza Operation were reviewed by the High Court of Justice while the operation was still going on. Two petitions,²²⁶ submitted and heard during the heat of battle, further illustrate the legal scrutiny of IDF’s activities by the High Court of justice even during active fighting. As stated by the President of the Court, the Hon. Judge Beinisch:

“Cases in which the court examines the legality of military operations while they are happening are not uncommon occurrences, in view of the reality of our lives in which we are constantly confronting terrorism that is directed against the civilian population of Israel, and in view of the need to respond to it while discharging the duties imposed by law even in times of combat. ... [I]t is the role of the court, even in times of combat, to determine whether within the framework of the combat operations the obligation to act in accordance with legal guidelines — both within the

²²⁶ *Physicians for Human Rights et. al. v. The Prime Minister et. al.*, H CJ 201/09 and H CJ 248/09, 19 January 2009, available at http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf.

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context of Israeli law and within the context of international humanitarian law — is being upheld.”²²⁷

279. The petitions were filed on 7 January 2009 and 9 January 2009. The petition in HCJ 201/09 claimed that there were delays in evacuating the wounded to hospitals in the Gaza Strip, and claimed that ambulances and medical personnel were being attacked by the IDF. The petition in HCJ 248/09 related to the shortage of electricity in the Gaza Strip, which it was claimed, prevented effective functioning of hospitals, clinics, water and sewage systems. The petitioners argued that this situation was the result of IDF actions during the Gaza operation.

280. After hearing the petitioners’ claims, as well as requesting and receiving detailed responses from the IDF with regard to the various humanitarian concerns that were raised, the Court denied both petitions. It found that “[i]t was made clear to [the Court] that the IDF and the high-level command authorities acting on its behalf are aware of and prepared to carry out their humanitarian obligations.”²²⁸

281. In particular, with regard to the first petition the Court held as follows:

“In view of the establishment and enhancement of the humanitarian mechanisms, which it may be assumed will prove their effectiveness, in view of the statement made to us that a serious effort will be made to improve the evacuation and treatment of the wounded, in view of the setting up of a clinic in the vicinity of the Erez crossing (and to the extent that the Palestinian side will also agree to the transfer of the wounded to Israel for treatment), it is to be hoped that the humanitarian mechanisms will operate properly in accordance with the obligations of the State of Israel. In these circumstances, we see no further reason to grant relief in the form of an order *nisi* at this time.”²²⁹

282. The Court reached a similar conclusion in the second case:

“It can be seen that steps have been taken in order to repair the faults in the electricity network in the Gaza Strip, and despite the state of combat and the security risks, efforts have been made to facilitate the entry into the Gaza Strip of industrial diesel oil for operating the local power station in Gaza, as well as additional humanitarian requirements, such as cooking

²²⁷ *Id.* at ¶ 12.

²²⁸ *Id.* at ¶ 28.

²²⁹ *Id.* at ¶ 23.

gas, diesel oil for transport, water, food and medications. In these circumstances, this petition should also be denied.”²³⁰

(5) Israel’s System for Investigating Complaints

283. As discussed above in Section V.C, Israel employs extensive training to try to ensure awareness and compliance by its commanders and soldiers with international law and domestic norms and laws, issues appropriate rules of engagement, plans military operations carefully to ensure that only legitimate military objectives are targeted, and implements in the field extensive precautions designed to minimise civilian harm to the extent feasible. Equally important, Israel is committed to fully investigating alleged violations of Israel’s legal obligations (including the Law of Armed Conflict), and to taking appropriate and effective action, including penalising IDF commanders or soldiers found to have committed offences. Numerous outside observers, including most recently the National Criminal Court of Appeals of Spain, have confirmed the thoroughness of Israel’s system for investigating such allegations, which is on par with the investigatory systems of many other countries. Israel has already activated this system with respect to the recent operations in Gaza, and as discussed in Section V.D(1) below, investigations are now underway. The integrity of these investigations must be maintained and they should be permitted to run their course, without prejudgment of the results.

(a) The Military Justice System

284. Israel’s legal and judicial apparatus is fully equipped and motivated to address alleged violations of national or international law by its commanders and soldiers. Such allegations are reviewed through a multi-tiered system of independent and impartial proceedings before Israeli investigative, administrative and judicial authorities, including Israel’s highest judicial instance, the Israeli Supreme Court.
285. Israel has a military justice system that operates within the IDF but is professionally independent. The military justice system is based primarily on the Military Justice Law of 1955, a comprehensive statute which governs the investigation of misconduct and indictment and prosecution of offenders and establishes the Court Martial system. The military justice system empowers the Military Advocate General to try soldiers not only for unique “military” offences (such as absence without leave, conduct unbecoming an officer, etc), but also for ordinary criminal offences under Israel’s Penal Law, 1973. Any and all allegations regarding offences committed by IDF personnel, and related to the

²³⁰ *Id.* at ¶ 26

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military, are dealt with through this multi-tiered system, including allegations regarding improper conduct on the battlefield.

286. The IDF system of review includes three main components: the Military Police Criminal Investigation Division (“MPCID”), the Military Advocate General’s Corps (“MAG”), and the Military Courts. The MAG Corps and Military Courts are both independent from the IDF command hierarchy, are subject only to the law, and are also entirely independent from one another.
287. According to Article 177 of the Military Justice Law, the Military Advocate General is appointed by the Minister of Defence, by recommendation of the Chief of the General Staff of the Israel Defence Forces. The appointment of the MAG by the Minister of Defence and not by the Chief of the General Staff, (as is the case with other officers in the IDF), is intended to preserve the MAG’s professional independence, in executing his authorities. The MAG’s powers and authority are in accordance with the Military Justice Law, IDF standing orders (Supreme Command Order 2.0613) clearly state that in executing his powers and authority, the MAG is subject only to the law, and is not subject to the IDF chain of command. On professional matters, the MAG is guided by the Attorney General.
288. Israel is an open and democratic society which fully respects the freedom of speech, an independent and free press and an active community of non-governmental and international organisations that operate in and from Israel. In this context, information on possible misconduct of soldiers reaches the IDF authorities in various ways, including complaints by the victims themselves or family members; complaints by commanders or soldiers who witnessed an incident; complaints by human rights organisations, journalists, embassies, or international bodies; and complaints forwarded to or filed directly with the MAG by the Israel Police and other law enforcement agencies. Any person may file a complaint with the Military Police in reference to misconduct by IDF personnel at any civilian police station in the country. Gaza residents can file complaints directly in writing through a NGO acting on their behalf or via the liaison mechanism that works vis-à-vis the Palestinian civilian population.
289. Generally, the MPCID investigates allegations of criminal offences committed by soldiers. Investigations dealing with complaints of misconduct by soldiers towards Palestinians (including with respect to events in Gaza) are conducted with the assistance of Arabic-speaking interpreters, who participate in and accompany interviews of Palestinian complainants and witnesses. Criminal investigators handling complaints by Palestinians

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undergo special training to equip them for dealing with these types of cases. When necessary, consultations are held with a Military Prosecutor from the MAG Corps regarding the proper handling of the case.

290. Where circumstances do not necessarily point to a criminal offence, the Military Advocate General will first review the findings of a “field investigation” — an inquiry conducted by the chain of command following operational activity, and governed by the Military Justice Law. Under the law and IDF standing orders, the findings of “field investigations” are relayed to the MAG for review, as well as any other available evidence (including information collected by NGOs), to assist him in deciding whether to order a criminal investigation. If after examining the aforementioned material, the MAG believes the facts indicate a reasonable suspicion that an offence may have been committed, which justifies the opening of a criminal investigation, he will launch a full a criminal investigation of the incident.
291. It is the common practice of the IDF that, following every military operation of any kind, a field investigation is conducted in order to examine the performance of the forces and to learn what aspects should be preserved and what aspects should be improved. The IDF conducts such field investigations on its own initiative, regardless of whether a complaint has been submitted. With regard to certain categories of cases, the IDF field commanders are under a duty to initiate and conduct specific field investigations, which are separate from the general field investigation of the operation as a whole. Such a duty exists with regards to cases that involve serious violations of the Laws of Armed Conflict, including when there are reliable reports on such cases by victims, witnesses, NGOs or the media.
292. As mentioned above, the Military Advocate General is entitled — and in some circumstances even obliged — to review the findings of such field investigations, and can, if the findings justify, order a full criminal investigation into the incident.
293. The authority to prosecute soldiers for offences connected to their military service lies with the MAG Corps. In cases where sufficient evidence has been collected according to the requirements of Israeli Penal Law, indictments are filed in the Military Courts. In the period from January 2002 through December 2008, 1,467 criminal investigations have been opened into alleged misconduct by soldiers, leading to the issuance of 140 indictments against soldiers regarding crimes committed against the Palestinian population. Of these indictments, as of December 2008, 103 defendants were convicted and ten cases are still pending. During the first six months of 2009, 123 criminal investigations were opened, with ten of them leading to indictments.

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294. A significant development in the investigation of alleged wrongdoing by IDF soldiers was the establishment, in October 2007, of the Office of the Military Advocate for Operational Affairs. This office is charged with investigating cases of operational misconduct by IDF soldiers against Palestinian civilians, such as mistreatment of prisoners, pillaging or theft, use of unnecessary force, abuse of authority etc. This special military prosecution unit was established and funded to enable the Military Prosecution to deal effectively and efficiently with these offences, in light of their importance and the added value of expertise gained by transferring these cases from regional offices of the prosecution to a special unit dedicated to their investigation. It also allows the automatic opening of criminal investigations in all such cases, on the premise that these specific crimes can never be justified by military necessity.
295. The effectiveness of the Office of the Military Advocate for Operational affairs, as well as the other measures taken by the IDF to eradicate any kind of misconduct towards Palestinians (including command and educational activities, which increased the number of cases reported by soldiers), is evident, as the number of investigations launched against soldiers has roughly doubled.

Criminal Investigations Launched Related to Palestinian Civilians							
	2002	2003	2004	2005	2006	2007	2008
Crimes of Violence	52	75	104	109	96	223	211
Crimes related to Death of Civilians	17	17	22	15	19	54	18
Crimes of Property	82	54	63	31	37	74	94
Total	151	146	189	155	152	351*	323*

296. As a general rule, the rules of evidence in the military legal courts system of the IDF are similar to the rules of evidence in Israeli criminal courts. When there is sufficient evidence to establish a reasonable basis for conviction of a soldier, an indictment may be filed against the soldier. The Military Prosecution is obligated to carefully examine the evidence and may only file an indictment when the evidence justifies doing so. Moreover, in addition to the challenges that prosecutors face to meet the high evidentiary standard in criminal law cases, IDF's military prosecutors face additional unique challenges due to the lack or partial cooperation of the complainants and/or of the Palestinian Authority. Another substantial difficulty in obtaining and securing physical evidence at the place of the commission of an alleged crime stems from security risks as well as active combat in the area.

297. As a general policy, the Military Prosecution seeks substantial sentences in cases of offences against the Palestinian civilian population and in appropriate cases appeals lenient sentences to the Military Court of Appeals. Traditionally, however, the Military Courts deal sternly with soldiers convicted of offences against civilians. The gravity attached by the Military Courts to offences against civilians is illustrated in the following excerpt from the Court's judgment in *C/62/03 Military Prosecutor v. Sgt Ilin*, involving a case of looting and improper conduct:

“A soldier committing prohibited acts during armed conflict inflicts injury upon the human dignity of the conquered as well as upon the humanity of the conqueror... It is clear therefore that the thunder of war and the heat of the battle actually demand reinforcement and amplification of the voice of morality....”

(b) Attorney General Review of Decisions of the Military Advocate General

298. The decisions of the Military Advocate General regarding the opening or non-opening of criminal investigations, as well as his decisions regarding the filing or non-filing of indictments, may be subject to further review by the Attorney General of the State of Israel, an independent figure of high authority. A complainant or non-governmental organisation may trigger the review of the Attorney General by simply sending a letter directly to the Attorney General, requesting further review of the matter.
299. With regard to the recent military operation in Gaza, it was decided that all findings of the five major field investigations, detailed in Section V.D(1) and the Military Advocate General decisions with regard to them be transferred for review by the Attorney General.

(c) Supreme Court of Israel Judicial Review of Decisions of the Military Advocate and Attorney General

300. In addition to review by the Military Advocate General and the Attorney General, complainants or non-governmental organisations who are dissatisfied with a decision of the Military Advocate General or of the Attorney General - including decisions with regard to whether to open a criminal investigation, or whether charges filed reflected the severity of the alleged crime, may file a petition directly to Israel's Supreme Court.
301. The Supreme Court regularly reviews determinations of the Military Advocate General and the Attorney General on these issues. For example, in one case the Supreme Court intervened in the Military Advocate's decision not to file criminal charges against a high

ranking field commander, resulting in the filing of such charges and ultimately in the conviction of the commander according to Israeli Penal law.²³¹ In another case, during the course of Supreme Court hearings, the Military Advocate General consented to open a military investigation into an incident for which investigation had not previously been conducted.²³² Just this month, on 1 July 2009, the Supreme Court intervened in a Military Advocate General decision to indict a soldier and a commander for the offence of “unbecoming conduct” under the Military Justice Law, in connection with the alleged firing of a rubber bullet at the feet of a detainee.²³³ Following the judgment, the MAG issued an amended indictment, charging the commander and the soldiers involved in the incidents with more serious offences.²³⁴

302. The scope of judicial review of Israel’s Supreme Court is very broad. According to the jurisprudence and practice of the Israeli Supreme Court, any interested party (including non-governmental organisations) or any person (including those who are neither Israeli citizens nor residents) who is affected or potentially affected by the actions of the government is entitled to directly petition the Israeli Supreme Court on any claim that a government action or an action of the IDF is *ultra vires*, unlawful or substantially unreasonable, including, *inter alia*, actions relating to the IDF military activity. In fact, in the year 2008 alone, over 2,000 petitions were filed to Israel’s Supreme Court. The Supreme Court rules as a matter of routine on such petitions, and when justified, issues injunctions against the Government, or other relief as appropriate. Consequently, petitions are brought on a regular basis by Palestinian residents, as well as NGOs or persons representing their interests claiming that they have been harmed by actions taken by the Israeli security forces, including operational activities in the West Bank and the Gaza Strip.
303. The Israeli Supreme Court has declared that the situation Israel faces as the target of terrorist attacks does not lessen the obligation of the State and its security forces to abide by applicable law and humanitarian standards. To the contrary, the Court has issued

²³¹ See *Jamal Abed al Kader Mahmoud Zofnan et al. v. Military Advocate General*, HCJ 425/89 (1989). In other cases, after careful scrutiny of the evidence, the Supreme Court found the MAG decision not to file charges reasonable. See, e.g., *Iman Atrash v. Military Advocate General*, HCJ 10682/06 (2007).

²³² See *Brian Avery v. Military Advocate General*, HCJ 11343/04 (2005).

²³³ *Ashraf Abu Rahma et al. v. Military Advocate General*, HCJ 7195/08 (1 July 2009) (“The military justice system, which is in charge of implementing the IDF’s values of conduct, must send out a determined message of consistent and decisive defence of the basic values of the society and the army, and of uncompromising enforcement in all levels — educational, commanding authority and punitive — of the fundamental principles that are shared by the Israeli society and the Israeli army and give them their ethical and humane character.”).

²³⁴ The amended indictment included the charging of the commander with the offence of threats under Section 192 of Israel’s Penal Law; and the soldier was charged with the crime of illegal use of a firearm in accordance with Section 85 of the Military Justice Law. Both were charged with the offence of conduct unbecoming an officer. The case is pending in the military court.

dozens of decisions addressing the issue of fighting terrorism within the law.²³⁵ As mentioned above, during the height of the military operation in Gaza, the Supreme Court agreed to hear petitions by NGOs alleging delays in evacuating the wounded, shortage of electricity in the Gaza Strip, and other complaints about humanitarian issues purportedly resulting from IDF actions. The Court stated that it would hear the case immediately, while battles in Gaza were still raging, as it “endeavours to examine the claims in real time, so that it may grant effective relief or arrive at an agreed settlement.”²³⁶

304. Israel’s Supreme Court has earned international respect and recognition for its jurisprudence, as well as for its independence, for actions it has taken in this regard. Its landmark rulings in several cases related to the balancing of security and the protection of individuals are well regarded by jurists and academic scholars of international law, and have been cited favourably by foreign courts, including the Supreme Court of Canada, the House of Lords in the United Kingdom, and the European Court of Justice.²³⁷ One United States court specifically rejected an argument that Israeli courts could not independently judge claims involving “serious charges ... against high officials of the Israeli government,” noting that “Israeli courts are entirely capable of making judgments displeasing to those in high civil or military authority.”²³⁸

²³⁵ Official English translations of over twenty five cases which address this issue are available at the website of Israel’s Supreme Court, <http://elyon1.court.gov.il/VerdictsSearch/EnglishStaticVerdicts.html>.

See, e.g., *Public Committee Against Torture in Israel v. The State of Israel et. al.*, HCJ 5100/94 (6 September 1999); *Iad Ashak Mahmud Marab et. al. v. IDF Commander in the West Bank*, HCJ 3239/02 (6 February 2003); *Beit Sourik Village Council et. al. v. The Government of Israel et. al.*, HCJ 2056/04 (30 June 2004); *Zaharan Yunis Muhammad Mara’aba et. al. v. The Prime Minister of Israel et. al.*, HCJ 7957/04 (15 September 2005); *Ahmad Issa Abdalla Yassin, Bil’in Village Council Chairman v. The Government of Israel et. al.*, HCJ 8414/05 (15 December 2008); *The Public Committee Against Torture in Israel et. al. v. The Government of Israel et. al.*, HCJ 769/02 (14 December 2006); *Adalah - The Legal Center for Arab Minority Rights in Israel et. al. v. GOC Central Command, IDF, et. al.*, HCJ 3799/02 (6 October 2005).

²³⁶ *Physicians for Human Rights et. al. v. The Prime Minister et. al.*, HCJ 201/09 and HCJ 248/09, ¶ 13 (19 January 2009), available at http://elyon1.court.gov.il/files_eng/09/010/002/n07/09002010.n07.pdf. As discussed above in Section V.C(4)(c), after full public hearings and review of the available facts, the Court determined that the IDF and high level command authorities were aware of their humanitarian obligations and were making efforts to fulfill their duties according to international law.

²³⁷ See, e.g., *Application Under S. 83.28 of the Criminal Code*, 2004 SCC 42, ¶ 7 (Supreme Court of Canada 2004) (citing the “eloquent” statements of Israel’s Supreme Court on the importance of responding to terrorism within the rule of law); *A and others v. Secretary of State for the Home Department*, 2 A.C. 221, ¶ 150 (U.K. House of Lords 2005) (emphasizing importance of the U.K.’s “retain[ing] the moral high ground which an open democratic society enjoys,” and thereby “uphold[ing] the values encapsulated in the judgment of the Supreme Court of Israel in *Public Committee Against Torture in Israel v. Israel* . . . [that] ‘[a]lthough a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand,’”) (citation omitted); *Kadi v. Council of the European Union*, 3 C.M.L.R. 41, ¶ AG 45 (European Court of Justice 2008) (quoting Supreme Court of Israel regarding importance of judicial oversight of political decisions, specifically that “[i]t is when the cannons roar that we especially need the laws... It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law’s war against those who rise up against it.”).

²³⁸ *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1077 (S.D.N.Y. 1992), *aff’d* 990 F.2d 71 (2d Cir. 1993).

305. The effectiveness of Israel's own systems for investigating complaints regarding combat activities which allegedly contradicted international law was recognised most recently by the Criminal Chamber of the National Court of Spain (Audiencia Nacional), which decided on 30 June 2009 by a wide margin (14-4) — and in a written decision issued on 17 July 2009 — to discontinue a Spanish investigation into alleged war crimes in the Gaza Strip. The proceedings concerned a 2002 incident in the Gaza Strip, where the Israeli Air Force targeted Saleh Shehadeh, the head of Hamas' military wing, killing Shehadeh but also a number of civilians. A Spanish judge had opened an inquiry into the matter pursuant to Spain's Universal Jurisdiction statute.
306. The Criminal Chamber of the National Court of Spain emphasised Israel's ability to fully and fairly investigate the charges itself. It held that Israeli procedures and decisions with regard to the legality of preventive strikes under international law, and the military, civilian and judicial review in Israel of the Shehadeh incident, comport with the principle of complementarity, as the State of Israel is a democratic country where the rule of law applies. The Court stated that:

“Furthermore, disputing the impartiality and organic and functional separation from the Executive of the Israeli Military Advocate General, the Attorney General of the State of Israel and the Investigation Commission appointed by the Israeli Government involves ignoring the existence of a social and democratic state with rule of law, where the members of the Executive and the Judiciary in question are subject to the rule of law. On the basis of those premises, there can be no doubt whatsoever with regard to the exercise of pertinent criminal actions in the event that the existence of any criminally relevant conduct on the part of the individuals who ordered, planned and carried out the bomb attack should come to light in the course of the investigations performed.”²³⁹

(d) Comparisons with Other Investigatory Systems

307. Israel's system for investigating alleged violations of Law of Armed Conflict compares well with the rule of law of other democratic States. To respond to alleged violations of the Law of Armed Conflict other countries also rely on a combination of military, criminal,

²³⁹Unofficial translation of Decision no. 1/2009, 17 July 2009 (plenary), of the National Criminal Court of Appeals (“Sala de lo Penal de la Audiencia Nacional”), at 24, regarding Preliminary Criminal Proceedings no. 154/2008 of the Central Investigation Court no. 4. *See also* Appeal of the Coordinating Prosecutor (Pedro Martínez Torrijos), 6 May 2009, from the Order of the Audiencia Nacional de Madrid, 4 May 2009, in Preliminary Proceedings Case No. 157/2008 (emphasizing that Israel's investigatory system, with review by the Military Advocate General, the Attorney General and the Supreme Court, “fully satisfy” the requirements of “an independent and impartial system of justice”).

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and administrative investigations.²⁴⁰ Likewise, criminal investigations in several other countries are conducted through a courts-martial system similar to that in place in Israel.²⁴¹

308. For example, the United Kingdom has used both criminal investigations and independent investigations within the military to examine allegations of violations of the Law of Armed Conflict.²⁴² In the United Kingdom, allegations of violations within the Army are forwarded to the Army Prosecuting Authority (“APA”).²⁴³ The Director of Army Legal Services, who is appointed by the Queen, “has responsibility for decisions on whether to direct trial for all cases referred by the military chain of command, and for the prosecution of all cases tried before courts-martial, the Standing Civilian Court and the Summary Appeal Court and for Appeals before the Courts-Martial Appeal Court and the House of Lords.”²⁴⁴ The Director of Army Legal Services delegates these decision-making functions to “ALS officers appointed as prosecutors in the APA.”²⁴⁵ As is the case in Israel, “[t]he APA is under the general superintendence of the Attorney-General and is, rightly, independent of the Army Chain of Command.”²⁴⁶ In addition to criminal investigations, the military in the United Kingdom also investigates allegations of violations of the Law of Armed Conflict through administrative actions, independent informal investigations, or through independent formal investigations ordered by a Board of Inquiry.²⁴⁷
309. Similarly, the procedures and institutions of the United States for such investigations, for example, are quite similar to those in Israel. To respond to alleged violations of the Law of Armed Conflict, the United States established comprehensive investigation procedures, which grants multiple actors within the Department of Defense and the military branches

²⁴⁰ See **United Kingdom**: Aitken Report, *An Investigation into Case of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004*, 25 January 2008, available at http://mod.uk/NR/ronlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf (hereafter “Aitken Report”) (describing the procedures for investigating violations of the Law of Armed Conflict in the United Kingdom); **United States**: Dept. of Defense Directive No. 2311.01E, *Dept. of Defense Law of War Program*, 9 May 2006 (setting forth the procedures for the investigation of “reportable incidents” regarding of the Law of Armed Conflict in the United States).

²⁴¹ See, e.g., **Canada, United Kingdom, and the United States**: Victor Hansen, *Changes Made in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn From this Revolution*, 16 Tul. J. Int’l & Comp. L. 419 (2008) (describing U.S., Canadian, and United Kingdom court martial systems).

²⁴² See Aitken Report, *An Investigation into Case of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004*, 25 January 2008, available at http://mod.uk/NR/ronlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf.

²⁴³ Aitken Report ¶ 28. The APA is in the process of being consolidated into a service-wide Prosecuting Authority in the UK, the commencement of which has been deferred until October 2009. See HM Crown Prosecution Inspectorate’s Follow-Up Report on the Army Prosecuting Authority, February 2009, ¶ 1.11.

²⁴⁴ Aitken Report ¶ 28.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* ¶ 36.

independent authority to order an investigation.²⁴⁸ Specifically, the investigatory procedures in the United States follow the same practice as in Israel, providing that when there is a “reportable incident”²⁴⁹ involving the Law of Armed Conflict, the appropriate field commander has the duty to report the incident up the chain of command immediately.²⁵⁰ The report then both moves up the chain of command to the relevant Commander of the Combatant Command, and goes to the appropriate military investigation agency to determine whether to initiate a criminal investigation, as well as to the General Counsel of the Department of Defense.²⁵¹

310. Criminal procedures in the United States system are conducted through a courts-martial system similar to that in place in Israel. Military prosecutors are required to be free from command influence, although as a matter of structure they are subordinate to the field commanders, unlike in Israel. In addition, in Israel the legal adviser has the authority to order criminal investigations and to prosecute soldiers, while in the United States, the “Convening Authority”²⁵² has jurisdiction to refer cases to a Court-martial for trial and to approve, modify, or disapprove the findings and sentences in Court-martial proceedings, and Judge-Advocates in the United States may only advise the Convening Authority.²⁵³ The U.S. system does not provide for independent judicial review of the decision to commence or not commence a criminal proceeding, as exists in Israel.²⁵⁴
311. While the U.K. and U.S. systems may not have the full panoply of independent investigatory and review mechanisms the Israeli system has, they nonetheless have been accepted as more than sufficient to investigate alleged abuses on their own.²⁵⁵ As

²⁴⁸ See Dept. of Defense Directive No. 2311.01E, *Dept. of Defense Law of War Program* (9 May 2006). Although the Defense Department Law of War Program Directive establishes comprehensive procedures for investigating incidents related to the Law of Armed Conflict, as developed below, investigations are typically ordered by military commanders or military investigation agencies.

²⁴⁹ A “reportable incident” is defined as “[a] possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations than war that would constitute a violation of the law of war if it occurred during an armed conflict.” See CJCSI 5810.01C ¶ 5(b).

²⁵⁰ See Dept. of Defense Directive No. 2311.01E ¶¶ 6.3-6.8; CJCSI 5810.01C ¶ 7(a)-(b).

²⁵¹ See Dept. of Defense Directive 2311.01E ¶ 6.5.1-2; CJCSI 5810.01C ¶ 7(c).

²⁵² “Convening Authority” is defined in R.C.M. 103(6) to include “a commissioned officer in command for the time being and successors in command.”

²⁵³ See R.C.M. 401, 504, 505, 601, 1107.

²⁵⁴ Many other countries likewise do not provide (as does Israel) for independent judicial review of either the decision to commence a criminal proceeding or the criminal proceedings themselves. See India: T. Padmanabha Rao, *Supreme Court Ruling on Court-Martial*, *The Hindu*, 17 April 2001, available at <http://www.hindu.com/2001/04/17/stories/0217000p.htm> (noting the lack of judicial review of court martial proceedings); Singapore: Abdul Wahab bin Sulaiman v. Commandant, Tanglin Detention Barracks, 1985-1 Malaysian L.J. 418, 1985 MLJ LEXIS 37 (Sing. 1985) (noting ruling by the High Court of Singapore that it lacked authority to review decisions of the Military Court of Appeals by prerogative writ).

²⁵⁵ See, e.g., Remarks of Justice Richard Goldstone *quoted in* Andy Clark, *Could ICC Prosecute U.S. for Iraq Crimes?* *Radio Netherlands*, 18 June 2009, available at <http://www.rnw.nl/id/node/6962> (noting that civilian deaths caused by the NATO bombings in Yugoslavia and by US military actions in Iraq and Afghanistan don’t “come anywhere near

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discussed above, this was the basis on which the National Court of Spain recently discontinued an investigation regarding a 2002 incident in Gaza: the Israeli system is independent and impartial, and is fully capable of investigating the matter on its own.

D. Complaints About the IDF's Conduct of Operations

312. Israel is acutely aware of concerns raised about the IDF's conduct of operations in Gaza, prompted by the civilian deaths and injuries and the damage to property during the conflict. Israel recognises that all allegations regarding violations of international law in Gaza by any party, for which there is reliable information, must be thoroughly investigated, and where appropriate, prosecuted. The IDF therefore initiated a series of field investigations into allegations regarding its conduct, as discussed in Section V.D(1) below. As referenced in Section V.C(5), investigations of allegations in previous military operations have resulted in criminal proceedings and convictions in appropriate cases.
313. The IDF's field investigations are only the first stage in the process. The MAG and the Attorney General will examine the findings (some already rendered, others, still pending) of those inquiries. Any affected party — Israelis and Palestinians alike, as well as non-governmental organisations — can appeal the decisions of both the MAG and the Attorney General to the Supreme Court sitting as the High Court of Justice, as they frequently do in other cases. The Supreme Court's decisions are a matter of public record.
314. Until these investigations are complete, and in order to preserve the integrity and independence of the investigations currently underway in Israel, it would be premature to reach any final conclusions regarding specific complaints, either as to general IDF practice during the recent conflict or as to specific incidents and allegations.²⁵⁶ Nonetheless, given extensive public discussion about these issues and the frequency with which conclusions have preceded rather than followed the evidence, this Paper sets forth below (in Sections V.D(2) and V.D(3)) some initial information regarding a number of complaints. This information may be released at this stage based on what is known from the investigations thus far, and without compromising the integrity and independence of the investigations

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the sorts of crimes" that merit international investigation and emphasising that democracies like the United States and EU countries have capable legal systems for investigating such complaints and pursuing sanctions as appropriate on their own).

²⁵⁶ The international community and national fora must respect and support national investigations currently in progress in Israel. To the extent that external organisations have gathered information related to the Gaza Operation, in the interest of justice, they should provide the information and any evidence on which it is based to Israel to facilitate those investigations. This is the essence of the principle of complementarity.

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which are in progress. It is possible that different findings will emerge as the investigations continue. Even so, even at this early stage these preliminary investigations have identified important facts that have not yet received significant public attention, but that are essential for any rigorous analysis of the Gaza Operation.

315. Any fair analysis of the Gaza Operation must also consider these facts against the broader analytical framework set out above, applicable to the Law of Armed Conflict. As indicated in Section V.A, international law does not condemn military actions simply because they resulted in unfortunate civilian casualties, as well as damage to civilian property and infrastructure. Rather, it examines whether commanders and soldiers had legitimate military objectives in their use of force, and whether they made appropriate efforts to minimise civilian casualties, based on a “reasonable commander” test and the information then available. Only if forces intentionally targeted civilians or fired indiscriminately, or struck military objectives despite knowing that (or without seeking to determine whether) they were likely to cause civilian harm that was excessive in relation to the military advantage anticipated at the time, can their actions be regarded as a violation of the law of war.

(1) The Status of Investigations

316. The IDF is in the midst of conducting comprehensive investigations, at various levels of the military justice system, regarding complaints about IDF conduct of operations in Gaza between December 2008 and January 2009. Thus far, the IDF has been examining about 100 complaints, originating from a variety of sources, including U.N. inquiries and NGO reports. Every alleged violation brought to the IDF’s attention has been or will be examined.
317. The examinations have commenced with an initial assessment of whether a complaint reveals suspicions of criminal behaviour. If the complaint appears to be based on *prima facie* evidence or raises serious concerns of intentional misconduct by IDF soldiers (such as the use of civilians as human shields, pillage, or maltreatment of detainees), it is generally referred directly to the Military Police for investigation. If the complaint concerned operational activity, it is first referred to a field investigation. The findings of the field investigations are subject to review by the Military Advocate General, who in turn decides whether to order a Military Police investigation, a stage which also involves the collection of outside testimony. Further details are provided below.

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318. *Field Investigations.* Following the Gaza Operation, IDF Chief of General Staff Lt. Gen. Ashkenazi appointed five Colonels who were not directly in the chain of command for the operations in question to investigate thoroughly issues raised by, among others, international and non-governmental organisations and the international and Israeli media. The decision to initiate these field investigations emanated from the IDF's professional, moral and legal obligations to examine all claims made in relation to the conduct of the warfare. The teams were tasked to deal with the following issues:²⁵⁷

- Claims regarding incidents where U.N. and international facilities were fired upon and damaged during the Gaza Operation;
- Incidents involving shooting at medical facilities, buildings, vehicles and crews;
- Claims regarding incidents in which civilians not directly participating in the hostilities were harmed;
- The use of weaponry containing phosphorous; and
- Destruction of private property and infrastructure by ground forces.

319. In accordance with standard IDF procedure for field investigations, the investigators operated independently and were provided access to all materials and the freedom to question any relevant IDF personnel. They were given the complaints received by the IDF and other Israeli authorities, interviewed many soldiers and officers, and gathered relevant documents and other materials from external sources. Each soldier whose testimony was requested was required to cooperate with the investigation, and the investigators received full cooperation.

320. The full findings of each of these five field investigations were presented to the IDF Chief of Staff, and a summary of those findings are reflected below, as representing Israel's current information about various alleged incidents and complaints. However, this does

²⁵⁷ The initial field investigations examined allegations regarding the following incidents, in chronological order: (1) Imad A'kel mosque (Jabaliya, 29 Dec); (2) a truck carrying oxygen tanks (Jabaliya, 29 Dec); (3) a medical team (Gabel Kashef, 31 Dec); (4) Ibrahim al-Maqadme mosque (Gaza, 2 January); (5) a house during medical treatment of wounded civilians (Sheikh Radwan, 3 January); (6) the American College (Beit Lahia, 3 January); (7) an ambulance (Beit Lahia, 4 January); (8) an ambulance (Sheikh A'jalin, 4 January); (9) the UNRWA Asma School (Shati, 5 January); (10) the Al-Daia family residence (6 January); (11) an UNRWA school (Jabaliya, 6 January); (12) the Deeb family (Jabaliya, 6 January); (13) an UNRWA convoy in Saleh A-Din street/Ezbet Abed Rabu (8 January); (14) a mother and child clinic (Sajaiya, 10 January); (15) the UNRWA compound (Gaza, 15 January); (16) the residence of Dr. Abu El-Eish (Jabaliya, 16 January); and (17) an UNRWA school (Beit Lahia, 17 January).

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not mean the investigations are closed. Rather, in accordance with usual practice, a summary of each investigation has been presented to the Military Advocate General, who is vested with authority to decide whether additional checks need to be done, or if there is sufficient basis for opening a military police investigation. His decision is independent, and he is subject only to the law. Due to the significance of the issues involved, the conclusions of the IDF field investigations and the opinion of the Military Advocate General will also be reviewed by the Attorney General. Accordingly, the investigations constitute only the first level of examination. This process is still, therefore, underway.

321. *Field Investigations in Progress.* In addition to the five broad field investigations above, the IDF Military Advocate General is awaiting the findings of field investigations into more than sixty other incidents, acting chiefly upon reports received from local and international NGOs. These include, *inter alia*, the following cases (in chronological order, and as an illustrative list only):

- Allegations regarding an air strike on a bus station near an UNRWA college which killed 12 civilians (Gaza, 27 December).
- Allegations regarding a missile attack against residential premises that killed 3 civilians and wounded 4 civilians, all members of the Al-Abasi family (Rafah refugee camp, 29 December).
- Allegations regarding an air strike that killed three children, members of the Al-Astal family (Al-Karara village, 2 January).
- Allegations regarding an air strike that damaged the Al-Raya medical centre (Gaza, 4 January).
- Allegations regarding the firing of shells and shootings that killed and wounded members of the Samouni family (Zeitun, 4 January).
- Allegations regarding artillery strike, including shells containing white phosphorous, and additional shootings, that killed and injured members of the Al-Halima family (Safiya area, 4 January).
- Allegations regarding the firing of tank shells on civilians carrying white flags that killed two civilians (Johar A-Dic, 4 January).

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- Allegations regarding the firing of Flechette rounds on an ambulance that killed one medical personnel and wounded another (Beit Lahia, 4 January).
- Allegations regarding the shooting of women carrying white flags, killing one of them (4 January).
- Allegations regarding an air strike that killed five members of the Abu-Ayisha family (A-Nasser neighbourhood, Gaza, 5 January).
- Allegations regarding the firing of Flechette rounds that killed two civilians (Izbat Beit Hanoun, 5 January).
- Allegations regarding the shooting of civilians carrying white flags, that killed one civilian (Beit Lahia, 5 January).
- Allegations regarding the firing of Flechette rounds that killed three civilians (Mugharka/Nezarim, 7 January).
- Allegations regarding the shooting of civilians carrying white flags that killed two civilians (Jabaliya, Abed Rabu neighbourhood, 7 January).
- Allegations regarding an artillery strike that damaged the European hospital (Khan Younis, 10 January).
- Allegations regarding the shooting of civilians carrying white flags that killed four civilians (Khuzaa', 13 January).
- Allegations regarding an air strike that killed 2 civilians members of the Al-Kurdi family (Gaza, 14 January).
- Allegations regarding an artillery strike, including by munitions containing white phosphorous, and tank shelling that damaged al-Quds hospital (Tel al-Hawa, 15 January).
- Allegations regarding an artillery strike, including by munitions containing white phosphorous, which killed 4 members of the Al-Khadad family.

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- Allegations regarding a missile that struck the residence of the Batran family and killed 6 civilians (Al Bureij, 16 January).
 - Allegations regarding an air strike on the residence of the Banar family that killed 10 civilians (Sajaiya, 16 January).
322. As explained above, after reviewing the field investigation findings, the MAG will decide whether to order Military Police investigations into the above incidents. The MAG may order criminal investigations without waiting for the results of a field investigation. Decisions of the MAG in this regard are made publicly available, and are subject to review by the Attorney General and possibly by the Supreme Court.
323. *Criminal Investigations in Progress.* In addition to these numerous field investigations, as of 1 July 2009 there were also thirteen IDF Military Police investigations currently in progress into incidents giving rise to suspicions of misconduct by IDF personnel during recent operations in Gaza.²⁵⁸ The allegations referred directly to military police investigations are as follows:
- Allegations regarding pillage (Zeitun, 3 January).
 - Allegations regarding violence and maltreatment of a Palestinian detainee (Beit Lahia, 3 January).
 - Allegations regarding the use of civilians as human shields (Jabaliya, 4 January).²⁵⁹
 - Allegations regarding violence and pillage (Al-Atatra, 5 January).
 - Allegations regarding the use of a civilian as a human shield (Beit Lahia, 5 January).
 - Allegations regarding the use of civilians as human shields (Azbet Abed Rabu, 5 January).
 - Allegations regarding the use of minors as human shields (Al-Atatra, 5 January).

²⁵⁸ As of 28 May 2009, an indictment has been filed by the IDF Prosecution against soldiers in connection with an incident of theft from a Gaza resident during the Operation.

²⁵⁹ Following the Gaza Operation several complaints were received alleging use by IDF troops of civilians in Gaza as human shields. This practice is strictly prohibited by IDF Standing Orders, as detailed above. Therefore, every complaint received in this regard was referred directly to Military Police for investigation.

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- Allegations regarding violence and ill-treatment of Palestinian detainees (Al-Atatra, 5 January) (2 separate investigations).
 - Allegations regarding damage to property and pillage (Al-Atatra, 5 January).
 - Allegations regarding violence and maltreatment of a civilian (Zeitun, 8 January).
 - Allegations regarding the use of a child as a human shield (Tel al-Hawa, 15 January).
 - Allegations regarding maltreatment and use as human shields of detainees (Jabaliya, date unknown).
 - Allegations regarding the use of civilians as human shields (Asmouni, date unknown).
324. *Criminal Investigation regarding the Rabin Military Preparation Center allegations.* During a conference held at the Rabin Military Preparation Center, several IDF soldiers who participated in the Operation levelled serious accusations of violations of the Law of Armed Conflict by the IDF, including intentional shooting of civilians. Due to the serious nature of these allegations, the MAG ordered a criminal investigation by the Military Police without awaiting a prior initiation of field investigations. The Military Police investigation revealed that some of the stories were based on hearsay and were not consistent with verifiable facts. Two examples, both from the Zeitun neighbourhood during the third week of the Gaza Operation, are discussed below.
325. One of the soldiers at the conference said that an order was given to open fire at an elderly woman, but later clarified to investigators that he had not personally witnessed the incident and was repeating a rumour. The investigation showed that in this case, IDF soldiers had fired at a suspected female suicide bomber who ignored numerous warnings to stop advancing in their direction.
326. The investigation revealed that IDF soldiers positioned in one of the houses in the neighbourhood were alerted that a female suicide bomber was present in the area. Soon after, they identified a woman wearing black clothes which seemed to be hiding something beneath them. She walked directly towards the house where the soldiers were present. When she reached the distance of 150 metres from the house, a number of shots were fired in the air in order to warn her from getting closer. Nevertheless, she kept walking towards the house. When the woman arrived at a distance of 60-100 metres from the house, several

additional shots were fired to a nearby point, in a manner that did not risk her, in order to deter her from getting to the house. She kept walking. At this stage, when she was close enough to be able to hear the soldiers, they called her to stop, and when that did not help, fired several shots towards her feet. Despite that, the woman kept approaching the house and only when she arrived at a distance of 20-40 metres from the house, and the soldiers were at substantial risk of being blown up, she was shot.

327. The account by a different soldier of a further incident allegedly involving the shooting of a woman and two children was also revealed to be based on hearsay. In this case, too, the Military Police probed the circumstances of the actual incident. The investigation revealed that the story originated with soldiers who mistakenly thought that one of their colleagues had opened fire on the women and children, when in fact he had fired at another target. The woman and children were unharmed.
328. The investigation revealed that a Palestinian family that was staying in a house occupied by IDF soldiers asked to leave, and was allowed to evacuate to a safe place. They were given a white flag and instructed – in Arabic – by the commander in charge as to the direction in which they should go. The commander made sure that they went to the right direction. At the same time, another soldier present in the same house identified two suspicious men walking towards the house from a different direction. They were warned to stop and ignored those warnings. The IDF soldiers therefore fired several shots towards their feet. The men were hit and evacuated to one of the houses in the neighbourhood. Based on these findings of the Military Police, the MAG decided to close the case.

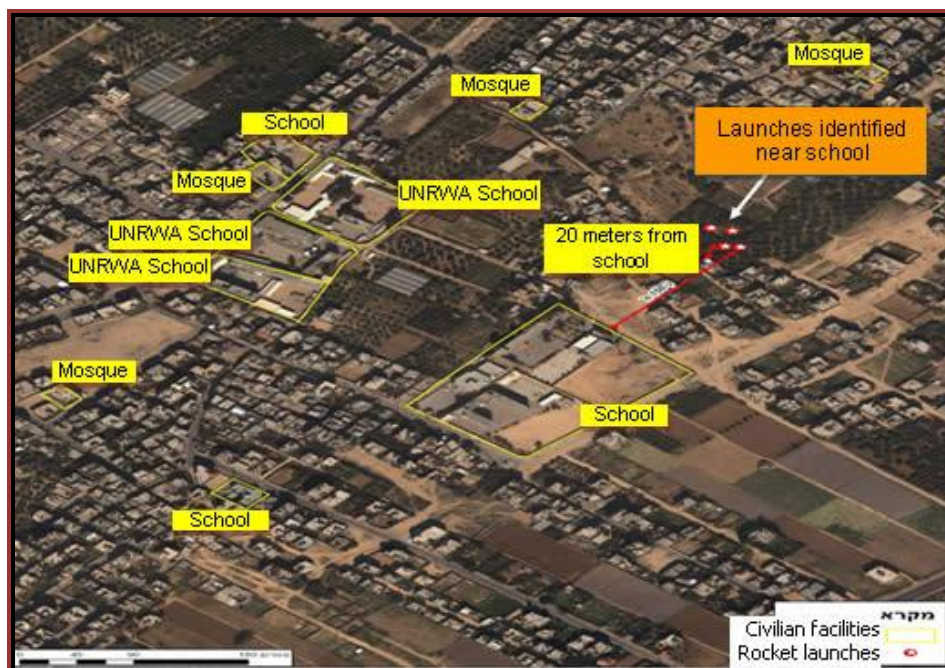
(2) Complaints about Specific Incidents

329. In this Section, the Paper addresses three broad categories of specific incidents — involving harm to U.N. or other international facilities, medical facilities and vehicles, and other specific incidents involving multiple civilian casualties — based on the findings of three of the five IDF field investigations that have now been completed, and that are under review by the Military Advocate General. Additional incidents within these categories are still under investigation at the IDF field level. The findings of the other two IDF field investigations, on more general concerns involving the IDF's use of certain munitions and destruction of private property and infrastructure, are set forth in Section V.D(3).

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(a) Incidents Involving Harm to U.N. and International Facilities

330. During the fighting in Gaza, the IDF faced a major challenge in avoiding damage to U.N. and other international and sensitive facilities. In the densely populated Gaza Strip there are over 750 United Nations facilities, and almost 1,900 sensitive facilities in total.
331. The challenge was made many times more difficult by Hamas' strategic placement of terrorist units and missile launching squads in close proximity to these sites, as evident in the following photographs:



- Mortar shells launched near an UNRWA school in the refugee camp in the central area of Gaza City (Source: IDF Spokesperson)

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- Rockets (red dot with a white star) launched near schools (yellow) in the Sheikh Radwan neighbourhood of Gaza City. In proximity to the schools there are training camps, terrorist organisation workshops for the manufacture of weapons and arms caches (red) (Source: IDF Spokesperson)

332. Notwithstanding the difficulties involved, in planning its Gaza Operation, the IDF took great care to map out these sensitive facilities, and to try to make sure they did not suffer damage during the Operation. During the Operation itself, the IDF took numerous precautions to avoid hitting facilities and vehicles affiliated with the U.N., Red Cross, Red Crescent and other international organisations. The IDF's rules of engagement included clear orders to avoid harm to these facilities and vehicles. Throughout the Operation, the IDF coordinated with the U.N. and other international organisations through a special Civil Administration situation room and a centre for humanitarian coordination established in order to help coordinate humanitarian aid day-to-day. These procedures allowed for movement of some 500 convoys and vehicles throughout the Gaza Strip, and the transfer of a substantial supply of food and humanitarian aid.
333. Despite these precautions, in a number of cases military operations resulted in damage to U.N. facilities and injuries to personnel. While the vast majority of facilities remained unharmed, Israel views the damage and injury that occurred in these cases as an extremely serious matter and is committed to investigating allegations regarding Israel's conduct in this regard. Investigations have already begun. The first step, under the procedures

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outlined above, was a thorough IDF field investigation. The results of this investigation are currently under review by the Military Advocate General.

334. Independent of the IDF's own investigation, the United Nations Secretary General set up a Board of Inquiry to examine certain incidents involving U.N. facilities. While Israel viewed this inquiry as premature, pending the conclusion of its internal investigations, it nonetheless cooperated fully with the U.N. Board of Inquiry, providing it with extensive facts and pertinent information. Indeed, the Secretary General of the United Nations commended Israel for its extensive cooperation.²⁶⁰ While Israel has concerns about certain aspects of the Board of Inquiry's methodology and its resulting report,²⁶¹ Israel is currently working together with the United Nations to address issues which were raised in the Inquiry. Indeed, procedures can always be improved and lessons learned. Already, in light of the incidents that did occur despite the IDF's precautions, and in parallel to the investigations undertaken thus far by Israel, IDF Chief of General Staff, Lt. Gen. Gabi Ashkenazi has re-emphasised the importance of better familiarising IDF forces at all levels with the location of sensitive facilities within their assigned combat zones. He ordered that regulations regarding safety-distances from sensitive facilities be highlighted, specifically with regard to the use of artillery, and also ordered that additional steps will be looked at to improve the coordination between the IDF and U.N. agencies in the field.
335. The following illustrative examples demonstrate both the process of investigation undertaken thus far in Israel with respect to certain incidents involving U.N. facilities, and the application of the proper legal standards to the facts currently available. As discussed above, the Law of Armed Conflict turns not on the simple fact that certain sites were damaged in the course of battlefield operations, but rather on whether military forces targeted military objectives, and whether in doing so they took into account considerations of proportionality, in weighing the possibility of incidental (but unintended) harm to civilian facilities or persons.²⁶²

²⁶⁰ See *Letter from the Secretary-General to the President of the Security Council*, 4 May 2009, at 2, available at <http://www.unhcr.org/refworld/docid/4a292c8dd.html> (expressing "appreciation for the cooperation provided by the Government of Israel to the Board").

²⁶¹ See Press Release, *Israel's reaction to the U.N. Board of Inquiry report*, Israel Ministry of Foreign Affairs, 5 May 2009, available at http://www.mfa.gov.il/MFA/About+the+Ministry/MFA+Spokesman/2009/Press+releases/Israel_reaction_UN_inspection_committee+report_5-May-2009.htm.

²⁶² This test is significantly different from the one the U.N. Board of Inquiry applied, which asked only whether the physical premises of U.N. facilities had been affected – a standard described as "inviolability" under diplomatic law. Unlike this standard adopted by the Board of Inquiry, the Law of Armed Conflict does not impute a violation from the mere fact that a particular site may have incurred damage, incidental to the targeting of a legitimate military objective.

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(i) UNRWA School in Jabaliya (Fahoura School): 6 January 2009

336. In this incident, which occurred on 6 January 2009, IDF mortar shells landed outside a school being used as a UNRWA shelter. No mortar rounds hit the school itself, but landed in the road outside the school and at a nearby compound, resulting in flying shrapnel that reportedly injured several people inside the school, and killed or injured others nearby.
337. The IDF's 'investigation of the incident found that, on 6 January 2009, an IDF force operating in the El-Attatra-Jabaliya area came under an effective barrage of 120mm mortars launched from a site about 3.5 km. from the force.²⁶³ The launching site was situated only 80 metres west of the UNRWA school. The mortar attack lasted for almost an hour, with one mortar being fired every few minutes. As reported in the media, local residents later confirmed that mortar fire was coming from the vicinity of the school.²⁶⁴
338. Soon after the source of fire was detected, a scouting unit was dispatched to confirm the location. Approximately 50 minutes after the mortar attack had begun, two independent sources cross-verified the location of the mortars. Only subsequent to this, and after verification of a safety margin of at least 50 metres between the target (i.e., the identified source of mortar fire) and the UNRWA school, did the force respond to the ongoing barrage, by using the most accurate weapon available to it — 120mm mortars.
339. The IDF force that was under attack fired four mortars, about 5-10 minutes after the cross-checked identification of the source of fire, and while Hamas mortars were still being fired towards the forces. The IDF response succeeded in stopping the Hamas mortar attack. Indeed, as a result of the response, five Hamas operatives were killed. The effectiveness of the mission in achieving its military objective is thus indisputable.
340. The IDF acted to defend the lives of soldiers under fire, in order to stop continuing mortar attack. The defensive action targeted an identified source of mortar fire which represented a concrete and immediate threat to the force. The IDF executed the responsive fire with as much precision as possible, given the available munitions. Indeed, the fact that all the

²⁶³ The IDF internal investigation provided important context for this incident. It revealed that Hamas often used 120mm mortars to attack Israeli towns and villages near the border of Gaza. Hamas terrorists had acquired significant expertise with these weapons and improved the accuracy of their technique; this tactic was central to Hamas' method of fighting the IDF in urban areas. Hamas' use of 120mm mortars posed a serious threat to IDF ground forces. Only a day before the incident in question, Hamas mortar fire had injured 30 IDF soldiers.

²⁶⁴ Associated Press, *Residents: Hamas Militants Staged Attacks from Cover of UN School*, 6 January 2009, available at <http://www.wkyl.com/home/headlines/37163864.html>.

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Israeli shells landed *outside* the school grounds demonstrates the care Israel took *not* to hit the school itself, consistent with its obligations under the Law of Armed Conflict.²⁶⁵

(ii) UNRWA Field Office Compound: 15 January 2009

341. In this incident, it has been alleged that IDF artillery firing caused shell casings and burning white phosphorous-soaked wedges to fall within a UNRWA Field Office compound, onto a warehouse area. The incident reportedly caused injuries to one UNRWA employee and two other unidentified persons who had taken shelter in the compound, as well as damage to buildings, vehicles and supplies
342. The IDF's investigation found that this incident occurred in the Tel al-Hawa neighbourhood on the twentieth day of the Gaza Operation, during the second week of the ground manoeuvre, in which IDF forces were operating deeper in the urban areas of Gaza in order to reach Hamas' bases, positions, weaponry warehouses, rocket factories, and launching areas. On the day of the incident, IDF ground forces, including tanks, were operating in Tel al-Hawa area against Hamas and other terrorist targets. IDF forces were proceeding towards topographically superior positions overlooking the area, and were exposed to constant fire by Hamas forces. Hamas units fired at the IDF with various kinds of weaponry, including light weapons, anti-tank missiles, and sniper fire.
343. Hamas' anti-tank units, equipped with advanced anti-tank missiles, were operating in this area. These units were located mainly near the northern side of the UNRWA compound, so that the compound was placed between Hamas' anti-tank units and IDF forces. The threat to Israeli forces was credible and imminent.
344. The IDF's primary rationale for deploying smoke screening munitions containing white phosphorous was to produce a smokescreen to protect Israeli forces from the Hamas anti-tank crews operating adjacent to the UNRWA headquarters. Such a smokescreen has proven an effective response to the anti-tank threat, since it effectively blocks the enemy's

²⁶⁵ The U.N. Board of Inquiry did not examine any of the critical issues required for a Law of Armed Conflict Analysis. Thus, as it admitted, it was "unable to reach any conclusion whether or not mortars were being fired and directed against the IDF from near to the school." U.N. BoI Report ¶ 23. The Board also conceded, with respect to people killed or injured outside the school, that "the extent to which they could be categorized as acting in a non-civilian capacity could not be adequately investigated within the Board's constraints." *Id.* ¶ 28. While the Board observed that in its opinion, "the means of response to an identified source of mortar fire that would have carried the least risk to civilians and property ... would have been a precisely targeted missile strike," it conceded that "[i]t was not in a position to assess whether such a means of response was available to the IDF at the time and, if it was not, the length and consequences of any delay until it might have become available." *Id.* ¶ 24. The Board thus did not attempt to engage in the type of analysis required by the Law of Armed Conflict, which (as discussed in Section V.A above) critically depends on the tools and information available at the time of targeting decisions, not hindsight judgments about alternative strategies that may or may not have been feasible.

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field of view and prevents it from using visual observation tools (including infra-red). As discussed in Section V.D(3)(a)(i) below, the IDF's use of the standard smoke projectile — which is commonly found in the arsenal of other armed forces of States worldwide — is lawful for this purpose.

345. The smokescreen created during the fighting in Tel al-Hawa was effective in achieving its military objectives. It prevented most of Hamas' attempts to launch anti-tank missiles, although one missile did hit an IDF tank. Hamas' anti-tank units, which are mobile, had to change their positions in order to be able to attack IDF forces. In the absence of the smoke-screen, the fight would have continued in this area, and the IDF would have had to use reactive fire to engage anti-tank units, with the likelihood of greater civilian harm.
346. The target zones of the smoke projectiles were determined in accordance with operational considerations, including the progress of IDF forces and the changing deployment of Hamas anti-tank units. The IDF sought to maintain a safety distance of several hundred metres from sensitive sites, including the UNRWA compound. Despite the maintenance of a safety distance, some felt wedges and other components of the projectiles apparently landed in the compound after the release of the felt wedges in the air. The IDF neither intended nor anticipated this outcome. Following a U.N. report on a fire in the compound, and in response to a request by the U.N., the IDF ceased the use of smoke projectiles in the area. In addition, the arrival of fire trucks and evacuation of tankers from the UNRWA compound was coordinated with the IDF.
347. In conclusion, the incident took place during intense fighting, which involved Hamas' deployment of anti-tank units equipped with advanced anti-tank missiles north of the UNRWA compound. Hamas thus placed the compound between themselves and the IDF forces.²⁶⁶ The IDF implemented an effective smokescreen as a protective measure in response to this threat. The operational advantage of using the smokescreen was significant. The IDF anticipated that the risk to civilians and civilian objects was limited in relation to this operational advantage. Unfortunately, however, three individuals were injured and U.N. facilities were damaged.

²⁶⁶ The U.N. Board of Inquiry reached its "conclusions" on the incident without fully weighing this critical fact. It acknowledged that — as with all of the incidents covered by its report — "it was not within its scope to assess general allegations or denials" regarding "possible military activity close to United Nations premises and possible military use of nearby buildings." U.N. BoI Report ¶ 97.

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(iii) UNRWA Bureij Health Centre

348. In this incident, an aerial bomb hit an apartment building opposite a UNRWA health centre. There were no injuries to the occupants of the apartment building, who had vacated the building following an earlier warning. However, debris and shrapnel from the strike apparently hit the UNRWA facility across the street, causing damage to the building and certain injuries inside, as well as injuries to persons who were approaching the centre's gate.
349. The IDF's investigation of this incident found that the strike involved the targeting of a legitimate military objective: a Hamas weapons and terrorist equipment storage site that also served as a weapons workshop. The site was located on the ground floor of a four story civilian residence in a densely populated area. The residence was connected to several neighbouring buildings and was adjacent to the UNRWA medical centre, as well as to mosques and an educational institution.
350. Given the location, the IDF carefully planned the operation, including an assessment of anticipated collateral damage, in order to minimise the risk to adjacent civilian facilities. Particular consideration was given to adjacent sensitive sites, such as the UNRWA health centre, which was marked in advance on IDF operational maps and aerial photographs. The IDF took the following steps in order to minimise possible incidental harm:
- The IDF issued warnings in advance, by means of leaflets and telephone calls, advising civilians to keep away from facilities serving Hamas and other terrorist groups, such as the terrorist storage site and weapons workshop in the apartment building.
 - Several minutes before the attack, phone calls were made to the residents of the targeted building, calling them to evacuate the premises. Subsequently, the IDF issued an additional early warning to the residents of the targeted building and bordering premises, with light weaponry that did not endanger the residents. This early warning was effective and clearly understood by the neighbouring residents, as confirmed by their evacuation of the building before the attack.
 - The IDF used precision munitions and fired only one munition. A delay fuse was used to ensure that the detonation of the ammunition would destroy only the terrorist storage site and weapons workshop, and not the buildings connected to it. This special mechanism limited the damage to neighbouring buildings.

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- The direction and the angle of the strike were calculated to minimise collateral damage.
351. The strike succeeded in achieving the military objective: it neutralised the terrorist storage site and weapons workshop, while the building itself remained standing, thus avoiding structural damage to connected and adjacent buildings. The incident thus involved the accurate targeting of a verified military target. As noted, as a result of IDF warnings there were no injuries to the occupants of the apartment building in which the weapons workshop was housed, or in the adjacent apartment buildings.
352. However no precautions are infallible, and despite the IDF's precautions in this case, the strike resulted in incidental harm to the neighbouring UNRWA centre. Israel regrets this harm, but this unfortunate fact it does not render the targeting decision in breach of the Law of Armed Conflict. Rather, the deliberate decision by Hamas to locate a weapons storage and workshop facility in a civilian building near the UNRWA medical centre, mosques, and an educational institution violated its obligations under the Law of Armed Conflict, including its obligation not to jeopardise the civilian population under its control.²⁶⁷

(iv) UNSCO Gaza Compound: 29 December 2008

353. This incident involved the aerial bombing by the IDF of a Hamas command and control centre, approximately 30 metres from a fence bordering a UNSCO compound. The attack occurred in the middle of the night when the nearby offices presumably would be empty. There were no direct hits on the UNSCO compound. However, the strike on the adjacent building reportedly caused shrapnel and concrete debris to fly into the compound, leading to physical damage to the premises, but no deaths or injuries.
354. As indicated, the operational goal of this strike was to eliminate a Hamas command and control centre and to destroy weapons and ammunition considered highly likely to be concealed beneath the building. The IDF took multiple precautions to minimise any incidental damage from this targeting of a verified military objective, including in particular the UNSCO compound, which was approximately 30 metres from the target and marked in advance as a sensitive site on IDF operational maps and aerial photographs. In particular, the IDF:

²⁶⁷ The U.N. Board of Inquiry acknowledged receiving information that "some occupants of the apartment building had Hamas affiliations," but did not consider itself sufficiently informed to reach a conclusion "as to whether or not the building was being used by Hamas for operational purposes." U.N. BoI Report ¶ 35.

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- Used precision munitions, and fired only three munitions on what was a very large military target. Furthermore, the IDF used a delay fuse to ensure detonation of the munitions only deep within the building, in order to limit the possibility of damage to neighbouring buildings.
 - Calculated the direction and the angle of the strike to minimise collateral damage, in particular to the UNSCO compound.
 - Carefully considered the timing of the strike, executing it at night to minimise civilian presence.
 - Issued advance warnings through leaflets and telephone calls, advising civilians to keep away from facilities being used by Hamas and other terrorist groups, including command and control centres, such as the one at issue here.
355. These precautions were effective in ensuring that there were no deaths or injuries at the UNSCO compound. The IDF complied with both the rule of distinction (targeting a valid military objective) and the rule of proportionality, using means that eliminated the significant military objective without any injury to civilians.²⁶⁸

(v) UNRWA Asma Elementary School: 5 January 2009

356. This incident involved a missile that struck within the compound of a UNRWA school. The school itself had been closed for some time when the incident occurred, and the missile struck at night. However, earlier that day, UNRWA apparently had opened the school as an emergency shelter, although it did not so notify the IDF until the day *after* the strike. The missile strike killed three men who were outside the school building.
357. IDF's investigation of the incident revealed the following information: On the night of 5 January 2009, a terrorist unit was present in Asma School preparing to carry out military activity against IDF forces. The unit was present at night in an elementary school compound, a place where no civilians were known or presumed to be at night, especially since the school had been closed for nine days *when the* incident occurred. Earlier that day, the UNRWA apparently had opened the school as an emergency shelter, although it did not so notify the IDF prior to the strike. The IDF concluded that there was no

²⁶⁸ The U.N. Board of Inquiry stated that "it was unable to reach any conclusion" as to "whether Hamas might have been using the Presidential Guest House as a command and control centre or as a munitions store," although the UNSCO personnel (for their part) had "no reason to believe that it was." U.N. BoI Report ¶ 73.

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reasonable explanation for the presence of the unit in the elementary school, other than their preparation for the terrorist activity. The IDF targeted the terrorist unit only after it cross-checked this information. In order to minimise incidental damage, the IDF selected and used a guided munition with a reduced warhead. In addition, visual observation was also used to ensure that no other individuals were present at the site.

358. Information regarding the School functioning as a shelter for civilians was provided by the U.N. to IDF only on 6 January 2009, the day *after* the incident had occurred. A list of facilities serving as shelters — provided by the U.N. one day earlier on 4 January 2009 — did not include UNRWA Asma School.²⁶⁹

(vi) UNRWA School: Beit Lahia Elementary School: 17 January 2009

359. This incident involved the alleged hitting of a UNRWA school being used as a shelter by white phosphorous-soaked felt wedges and certain debris. Several deaths and injuries were reported.
360. 'The IDF's investigation found that the incident occurred during a period in which IDF ground forces, including tanks, were operating in Beit Lahia against rocket-launching units and terrorist infrastructure. The forces were moving in an inferior terrain, threatened by Hamas positions located in the higher urban zone, including by Hamas' units armed with advanced anti-tank missiles. IDF forces were exposed to continuous fire from different sources.
361. In accordance with the combat doctrine for dealing with anti-tank threats, IDF forces fighting in Beit Lahia used standard smoke projectiles in order to create a protective smokescreen between themselves and Hamas' anti-tank units along the route of their progress. This smokescreen was effective and prevented Hamas from launching anti-tank missiles at IDF tanks. In the absence of such a smokescreen, it would have been necessary to use reactive fire at anti-tank units, with the likelihood of more extensive collateral damage.

²⁶⁹ The U.N. Board of Inquiry confirmed these critically important facts, while contending that aerial monitoring during the day should have revealed civilians queuing to register. U.N. BoI Report, ¶ 11, 15. The Board did not suggest that aerial monitoring *in the evening*, when the missile was actually fired, should have been expected to detect a civilian presence at a site that had not yet been notified to the IDF for use as a shelter. Nonetheless, the Board concluded that "the IDF carried out a direct and intentional strike on United Nations premises." *Id.* ¶ 16.

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362. The initial target zone of the smoke projectiles was located at a distance of one kilometre from the UNRWA school. The target zone was later adjusted in accordance with the progress of IDF forces, the wind direction and the deployment of Hamas anti-tank units. The nearest target zone to UNRWA school was several hundred metres from the School.
363. Despite the maintenance of an appropriate safety buffer between the nearest target zone of the smoke projectiles and the School, some felt wedges and other components of the projectiles unfortunately may have landed in the School. According to U.N. reports, such components apparently struck the roof of the School and caused significant casualties in one of the classrooms. It should be noted that such a falling of components is incidental to any use of air-burst munitions, including for the purpose of smoke screening, illumination, and so on.
364. In conclusion, the incident involved the implementation of an effective smokescreen as a protective measure, in response to concrete threats of Hamas anti-tank units against IDF tanks operating in Beit Lahia. The operational advantage of using the smokescreen was significant.²⁷⁰ IDF forces had not anticipated significant collateral damage in relation to this advantage. The IDF is greatly saddened that civilians were injured, but this unfortunate fact does not render the original targeting decision a violation of the Law of Armed Conflict.

(vii) UNRWA Vehicle Convoy: 8 January 2009

365. The IDF also investigated an incident in which, according to a U.N. review, “small arms fire” was directed towards the lead car of a UNRWA convoy in the Ezbet Abed Rabu area, which was then occupied by the IDF.
366. According to initial findings, on the same day of the incident, there were three different U.N. movements coordinated with the IDF in the area of Ezbet Abed Rabu. There may have been a mutual misunderstanding concerning the coordination, which might have

²⁷⁰ The U.N. Board of Inquiry reached its “conclusions” regarding the incident without making any findings “as to whether Hamas units were present in the Beit Lahia neighbourhood ..., [or] whether IDF forces were exposed to fire or whether the laying of a smokescreen or other reactive measures were necessary in consequence.” U.N. BoI Report ¶ 64. Yet these factors are essential for any proper analysis of distinction or proportionality, because (as explained in Section V.A above), both tests require consideration of legitimate military objectives. Proportionality in particular requires the weighing of the importance of such objectives against the likelihood of civilian harm, from the perspective of a “reasonable commander” at the time. Nor did the Board apparently consider any precautions taken by the IDF to minimize civilian casualties. Instead, the Board simply concluded that “whatever precautions were taken by the IDF in the current case, they were clearly inadequate in relation to the use of an extremely dangerous substance in a populated urban area.” *Id.* ¶ 67.

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provided the relevant ground force with inaccurate information regarding the concrete movement.

367. The IDF has been concerned that errors in communication may have led to this incident, even though no injuries occurred. Accordingly, immediate steps were taken to rectify the situation, including providing credible assurances that the security of United Nations personnel, installations and humanitarian operations would be fully respected and that there would be undertakings for improved liaison and more effective internal coordination within the IDF.

(viii) UNRWA Vehicle: 14 January 2009

368. The IDF also conducted a field investigation into a complaint that a UNRWA vehicle came under fire in the Tel al-Hawa neighbourhood on 14 January 2009. The investigation found that the vehicle bore no U.N. markings at the time of the firing, and was travelling in an area that international organisations had been told was forbidden for movement. Most importantly, the vehicle was transporting a Hamas anti-tank squad, in clear violation of the prohibition on using humanitarian vehicles to support military operations. Immediately after discharging the anti-tank squad, the vehicle proceeded erratically toward the IDF forces. The IDF had due cause to think the vehicle was a Hamas car bomb, raising legitimate concerns about the security of its own forces.
369. The IDF's use of force against an unmarked vehicle carrying a Hamas anti-tank unit comported with the Law of Armed Conflict. The IDF did not deliberately target a U.N. vehicle; indeed, the vehicle bore no U.N. markings. Furthermore, Hamas had turned the vehicle into a legitimate target by conscripting it for use in combat operations. In addition, it was fully appropriate for the IDF to take into account the security of its forces, in assessing the legitimacy of the target, as discussed in Section V.A.

(b) Incidents Involving Medical Facilities, Vehicles and Personnel

370. Israel is firmly committed to the protection of medical staff and facilities during armed conflict. The IDF operated a medical situation room in the Gaza District Coordination and Liaison, which coordinated the evacuation from the combat zone of wounded and trapped civilians. During the Gaza Operation, the medical situation room coordinated 150 different requests.

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371. In addition to the general precautions followed to avoid civilian casualties described in Section V.C above, IDF trains forces at all levels to exercise extra caution to avoid harming medical crews and facilities. In the Gaza Operation, the IDF reinforced those instructions. In many cases IDF forces suspended their operations against legitimate military objectives when a medical vehicle or medical staff were in the vicinity. In some of these instances, the IDF refrained from attacking medical vehicles *even* in cases where Hamas and other terrorist organisations were using them for military purposes. Such restraint was not required under the Law of Armed Conflict, under which protection to medical vehicles may cease if the vehicles are being “used to commit, outside their humanitarian function, acts harmful to the enemy.”²⁷¹ Indeed, as discussed in Section V.B above, Hamas itself was violating the Law of Armed Conflict by using ambulances to transport terrorist operatives and weaponry and to evacuate non-wounded terrorists from the battlefield, and by using hospitals and medical infrastructure as headquarters, situation-rooms, command centres and hiding places.²⁷²
372. The IDF launched an investigation into allegations about harm to medical facilities, vehicles and crews. The investigation resulted in initial findings, which are now subject to review by the Military Advocate General and the Attorney General, and possibly the ultimate review by the Israeli Supreme Court. The IDF Chief of the General Staff, Lt. Gen. Gabi Ashkenazi, has accepted the investigating colonel’s recommendations for further improvement of training and procedures, including practice by all forces in “incidents and responses” drills involving prevention of harm to medical crews, facilities and vehicles. The Chief of the General Staff also ordered an examination of the operation of the humanitarian corridors opened for the benefit of the local population during the fighting.
373. In the meantime, the IDF received additional allegations, which it is investigating. Many of the specific incidents mentioned by NGOs are still under investigation. However, certain information is presently available, as summarised below.

²⁷¹ Additional Protocol I, art. 13(1).

²⁷² See, e.g., Additional Protocol I, art. 12(4) (“Under no circumstances shall medical units be used in an attempt to shield military objectives from attack”); art. 58 (“The Parties to the conflict shall, to the maximum extent feasible: (a) . . . endeavor to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives; (b) Avoid locating military objectives within or near densely populated areas; (c) Take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.”).

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(i) Medical Facilities

374. The IDF investigated an incident that occurred on 10 January 2009, in which a building housing a mother-and-child clinic was damaged. The operation targeting the building caused physical damage to the structure, but no injuries to anyone. The operational goal was to destroy a Hamas storage site located in the same the building, which contained weapons and military equipment. Hamas used this site in gross violation of its duty not to jeopardise civilians and medical facilities. The first floor of the building served as a mother-and-child clinic, but there was no sign indicating the presence of the clinic, and its location had not been reported or otherwise known to the IDF prior to the military operation against the weapons depot.
375. The IDF carefully planned the operation, including by assessing any possible collateral damage to adjacent civilian facilities. The IDF undertook the following measures in order to minimise possible incidental harm:
- Issued warnings in advance, by means of leaflets and telephone calls, calling on civilians to keep away from facilities serving Hamas and other terrorist groups, such as the said terrorist storage site and weapons workshop.
 - Issued, in addition, several minutes before the strike, an additional and effective early warning to the residents of the targeted building, by use of light weaponry in a manner not endangering those residents. This early warning was effective and clearly understood by the residents, as confirmed before the strike and by the fact the there were no casualties.
 - Used a precision munition and fired only one munition.
 - Calculated the direction and the angle of the strike to minimise collateral damage.
 - A direct hit on the target was verified, *inter alia*, by secondary explosions that indicated there were, in fact, a substantial amount of explosives inside the building.
376. The IDF has also been criticised for attacking the Khan Younis European Hospital on 8 January 2009, resulting in damage to the generator but no injuries. This incident is currently under field investigation, as are allegations concerning damage to infrastructure (but no injuries) at al-Quds hospital.

(ii) Medical Vehicles

377. The IDF investigated a number of reported cases involving attacks on medical vehicles. Some of these cases involved vehicles being driven in a suspicious manner, often at night, without prior coordination with IDF forces and without clear markings of medical use (for example, through flashing lights). In these situations, IDF soldiers were concerned that the vehicles might be used for military purposes, such as a suicide attack, and in many cases fired warning shots, consistent with applicable procedures under the Law of Armed Conflict.²⁷³ The IDF investigation concluded that IDF forces were mistaken in some of these assessments. However, as discussed in Section V.A, the standard against which the action is gauged is one of reasonableness of the commander making decisions in real time. Under this standard, the conduct of IDF forces was reasonable and did not demonstrate the intent or recklessness necessary to elevate such action to the level of violation of the Law of Armed Conflict.
378. One incident, for instance, took place on 4 January 2009, around 11:00 p.m., near the neighbourhood of A'ghalin. A vehicle was travelling without flashing lights on a main road that the IDF was monitoring in an effort to prevent terrorist movements. The vehicle drove toward an IDF tank. The soldiers in the tank had no way of knowing the vehicle was an ambulance, and suspected that it was a car bomb. Accordingly, these soldiers tried to stop the vehicle by using a number of warning measures, including firing warning shots in the air, followed by warning shots near the vehicle. When the ambulance was only 100 metres away from the tank, posing a potentially serious threat to the IDF force, the force opened fire, in a manner that minimised the risk to its passengers.²⁷⁴ After these warning shots, the vehicle turned around and drove away.
379. Another incident occurred on 13 January 2009 in the Zeitun neighbourhood, around 3:30 p.m. An IDF force sheltering in a structure, north of the Nezarim junction, received a credible warning that a terrorist squad intended to attack the structure. Shortly after the warning, the force identified an ambulance driving quickly towards the junction, bypassing a roadblock established on the road and turning toward the structure. The soldiers took a number of warning measures, including firing warning shots in the air, in order to stop the vehicle. Despite these warnings, the ambulance continued toward the structure. The ambulance came within 50 metres of the structure, at which point the IDF soldiers fired at

²⁷³ Additional Protocol I, art. 13(1) (protection to medical vehicles may cease if they are being used outside their humanitarian purpose, and after “a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded”).

²⁷⁴ Usually, warning shots are fired first in the air or to an object, such as a wall, near the vehicle, and only thereafter to the rear of the vehicle or another part that will not endanger the passengers.

the driver. The vehicle then turned around and drove off. No casualties were reported in this incident.

(iii) Medical Personnel

380. IDF investigations into allegations regarding health service staff wounded or killed during the Gaza Operation revealed that some of the reported cases were based on false information. For instance, Palestinians reported that a member of a Palestinian medical team was killed as a result of IDF strike on 3 January 2009, on the residence of the Dababish family in the Sheikh Radwan neighbourhood. The IDF investigation found that the person reported killed was in fact alive. Similarly, the IDF received reports that an IDF helicopter had fired on an ambulance in Beit Lahia, near the Abu-Ubeida School, on 4 January 2009 and killed the ambulance driver and two paramedics. In this case, the “deceased” ambulance driver was interviewed on a Hamas website a few days after the incident. The IDF investigation found that the only Palestinian killed in that incident was in fact a Hamas operative.

(c) Incidents Involving Multiple Civilian Casualties

381. The IDF acknowledges a number of unfortunate incidents during the Operation in Gaza, in which multiple civilians were harmed. Consistent with the high standards to which it holds its armed forces, Israel is rigorously investigating these incidents, and will continue to do so with respect to additional incidents brought to its attention.
382. As a first step, the IDF conducted a field investigation examining seven incidents in which the IDF allegedly harmed civilians. With respect to these specific incidents, the investigation concluded that IDF operations did harm civilians who were not directly participating in the fighting. The IDF is deeply saddened by the deaths and injuries of all civilians and especially of children. The harm to these individuals was not intentional, and based on the facts currently known — and subject to the pending review of the Military Advocate General and the Attorney General — there appears no basis for the serious charges advanced by some.
383. To the contrary, where the risk of unintentional harm to civilians could be foreseen, the IDF fully complied with the Law of Armed Conflict by taking many measures to minimise this risk, including using precise intelligence and providing warnings prior to the attack. That harm occurred despite these precautions is extremely unfortunate, but it does not constitute a violation of law attributable to the IDF. To the contrary, a significant proportion of the incidents occurred as a result of Hamas’ illegitimate use of Palestinian

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civilians, taking cover amongst the civilian population and using civilian facilities and structures as part of its terrorist operation against Israel.

384. Investigation of the following incidents reached the following preliminary conclusions (other incidents are still under investigation).

(i) **The Al-Daia Family Residence, Zeitun Neighbourhood: 6 January 2009**

385. During this extremely unfortunate incident, members of the Al-Daia family were killed when the Israeli Air Force bombed their house.
386. The IDF has concluded that this tragic event was the result of an operational error. An investigation determined that the IDF intended to strike a weapons' storage facility located in a building next to this residence. However, the IDF erroneously targeted the Al-Daia residence, rather than the weapons storehouse. Although the IDF did provide warning shots to the roof of the Al-Daia residence, other warnings (such as the warning phone call) were made to the building *actually* containing the weapons, not the Al-Daia residence.
387. The IDF is examining how the unfortunate operational error occurred, in order to reinforce safeguards and to prevent its recurrence. Israel deeply regrets the tragic outcome. This is the kind of mistake that can occur during intensive fighting in a crowded environment, against an enemy that uses civilian neighbourhoods as cover for its operations. IDF forces did not intentionally target civilians. This lack of unlawful intent has been a critical factor, in past incidents involving operational mistakes by other armies (such as NATO's erroneous bombing of the Chinese Embassy in the former Yugoslavia), in determining that no violation of the Law of Armed Conflict occurred.²⁷⁵ Similarly, although its attack on the Al-Daia residence was a tragic error, it did not constitute a violation of the laws of war.

(ii) **The House of Nazar Ri'an: 1 January 2009**

388. During this episode, which was widely reported by NGOs, Ri'an and members of his family were killed in an aerial strike that hit their home. Ri'an was a senior Hamas operative, but he was not the target of the attack, although the IDF legitimately could have treated him as a military target due to his central role in planning and executing terrorist

²⁷⁵ NATO Bombings, Final Report to the ICTY Prosecutor, ¶¶ 80-85 (noting that "[b]y the admission of US Government sources, the Chinese Embassy compound was mistakenly hit," due to operational mistakes in target location, and declining to assign criminal responsibility either to the aircrew involved in the attack or to senior leaders, in the absence of any unlawful intent).

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attacks. Instead, the operational goal of the strike was to destroy Hamas' central compound in the Jabaliya refugee camp. The compound included several buildings that served as storage sites for large quantity of sophisticated weapons. The IDF limited the planned attack to the weapons storage site and did not seek to injure or harm Ri'an or, of course, any members of his family.

389. In an effort to ensure that it destroyed only the storage facilities, and did not harm civilians residing in the buildings, the IDF issued several warnings before the attack. These included not only general leaflets and telephone calls, alerting civilians to avoid facilities serving Hamas and other terrorist groups, but specific phone calls to the residents of the targeted buildings, notifying them of the planned strike and warning them to evacuate the premises. The IDF also fired two separate rounds of preliminary warning shots with light weapons, 13 minutes and 9 minutes before the strike, providing sufficient time for residents to evacuate. The residents evidently understood these early warnings, as a group of them did leave the building, a fact confirmed by IDF surveillance before proceeding with the strike. The IDF observed this group evacuation and drew the reasonable conclusion that the buildings (including Ri'an's house) were empty. Only then did the IDF launch the strike.
390. Following the strike, secondary explosions were visible. This confirmed that Hamas used the buildings for weapons storage, and therefore it was a legitimate military objective according to the Law of Armed Conflict. Only later was it discovered that, Ri'an and his family chose to remain in the building after others had evacuated, leading to their death.
391. The deaths of the Ri'an family members were tragic. Even so, it must be underscored that the IDF took appropriate steps to tailor its military strike to a proper military objective (the weapons storage site) under the cover of a civilian residence, and to extricate civilians from possible harm. To that end, the forces complied with international norms by giving effective advance warnings to at-risk civilians. That some civilians heeded these warnings, while the Ri'an family apparently did not, does not render the IDF's action unlawful.

(iii) The House of Dr. Abu el Eish: 17 January 2009

392. The IDF thoroughly investigated this incident, in which the doctor's three daughters were killed. The investigation concluded that an IDF tank fired two shells, which resulted in these unfortunate casualties.

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393. The investigation found that the IDF force operated in the area of Sajaiya for several days, during which they were engaged in face to face combat within short range of Hamas terrorist units. The IDF forces discovered tunnels used for ambushing and attacking IDF forces, and identified homes that were booby-trapped.
394. On Friday, 16 January 2009, the IDF force came under sniper and mortar fire in an area laden with explosives and IEDs. The IDF force identified and located the source of fire as a house adjacent to that of the doctor's. The IDF returned fire and then saw several figures moving suspiciously in the upper level of a house nearby, which was in fact, Dr. Abu El-Eish's house. The IDF troops concluded that these figures were spotters directing the arms fire of the snipers. Hamas had used this method of target location throughout the Gaza Operation. Still, under heavy fire, the commander of the force waited about 20 minutes in an effort to ensure that the suspicious figures were in fact Hamas operatives, and that civilians would not be at risk before ordering the attack on the house. Only then did he give the order to open fire on the presumed spotters.
395. Following the firing of shots, the IDF soldiers heard screams from the direction of the house, and immediately halted all fire. When contact was made with the doctor, the IDF force made sure that ambulances could evacuate the injured via the Erez Crossing for immediate emergency medical treatment in Israel.
396. In the days leading up to the incident, officers in the Coordination and Liaison Administration had contacted Dr. Abu El-Eish several times to urge him to temporarily evacuate his home, as many others in the neighbourhood already had, because of Hamas operations and the intense fighting that was already taking place in that area for several days. In addition to the personal contact made directly with Dr. Abu El-Eish, the IDF issued warnings to the residents of Sajaiya by dropping thousands of leaflets as well as issuing warnings via Palestinian media outlets. Dr. Abu El-Eish chose to remain in the house, with his family, despite the specific personal warnings he received and the evident risks associated with Hamas sniper activity from the adjacent building.
397. The IDF regrets the tragic deaths of Dr. Abu El-Eish's daughters. However, considering the constraints of the battle scene, the threats endangering IDF forces and the reasonable estimation of the forces that the house was being used to direct sniper fire, the decision to target the building was intended only to respond to a perceived threat, and in no way breached the Law of Armed Conflict.

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(iv) Attack on Truck Carrying Oxygen Tanks: 29 December 2008

398. This incident took place during the first stage of the Gaza Operation, in the area of the Jabaliya refugee camp. IDF surveillance identified a truck carrying objects that looked like Grad rockets based on their size and shape. The objects were being loaded into the truck next to a recognised Hamas rocket manufacturing site, and close to Hamas' central base. The loading point was also near an area frequently used by Hamas to launch rockets towards Israel.
399. On the basis of this information, the IDF concluded that the truck was carrying rockets from the Hamas rocket manufacturing facility to a launch site. In fact, the truck was carrying oxygen tanks and not rockets. The strike against the truck, together with the secondary explosions of the oxygen tanks, killed four Hamas operatives and four civilians.
400. Though there was misidentification of the oxygen tanks as rockets, the error was caused by the proximity to terrorist sites used for rocket launches. There was no intent to attack a civilian object or to place civilians in undue danger.²⁷⁶ Destroying rockets before they reach a launch site was considered an urgent operational objective.

(v) Alleged Attacks on Mosques

401. In accordance with the Law of Armed Conflict, IDF rules of engagement expressly forbid attacks directed against sacred places, unless they are used for military purposes. As explained in details above, Hamas frequently used mosques for such purposes, in particular for the storage of weapons and munitions. As part of the investigation into civilian-related incidents, the investigating Colonel examined allegations regarding alleged IDF attacks on two religious sites, in which it was claimed that civilians were injured or killed.
402. One incident involved an alleged attack against Maqadme Mosque in Beit Lahia on 3 January 2009. The IDF inquiry revealed that the mosque was not attacked at all. The individuals reported as killed in this incident were in fact killed in other incidents not

²⁷⁶ The incident resembles to a certain extent the one which took place during the NATO bombing campaign in Yugoslavia, where pilots bombed a convoy that they believed consisted of military vehicles, but which later turned out to be tractors carrying Albanian refugees. Some 75 people were killed and 100 injured, but the NATO Prosecutor declined to proceed with any charges. The assessment was that "civilians were not deliberately attacked in this incident," and that "it is difficult for any aircrew operating an aircraft flying ... at a substantial height to distinguish between military and civilian vehicles in a convoy." Further, while in hindsight "the aircrews could have benefitted from lower altitude scrutiny of the target in an early stage, ... neither the aircrew nor their commanders displayed the degree of recklessness in failing to take precautionary measures" which could amount to a violation of applicable law. NATO Bombings, Final Report to the ICTY Prosecutor, ¶¶ 63-70.

involving the mosque. Further, the supposed “civilians” who were casualties of the attack were in fact Hamas operatives killed while fighting against the IDF.

403. The second incident involved alleged strikes against the Rabat Mosque in Beit Lahia on 9 January 2009. The IDF investigation found no evidence that such a strike took place.

(3) General Concerns about IDF Operations

404. In addition to the three IDF field investigations regarding specific incidents, discussed above, the IDF also examined two broad areas of concern about IDF operations, involving the use of munitions containing white phosphorous and damage to infrastructure and destruction of buildings by ground forces. The findings of those investigations (which remain subject to review by the Military Advocate General and the Attorney General) are discussed below. This Section also addresses the lawfulness of the IDF’s limited use of flechette munitions.

(a) The Use of Munitions Containing White Phosphorous and Flechettes

405. The IDF uses only weapons and munitions defined as legal under international law and authorised as such by the relevant IDF authorities, including MAG officers. In this regard, the IDF complies strictly with the applicable restrictions governing the use of certain weapons and munitions. Furthermore, all weapons and munitions are employed in accordance with the general rules of International Humanitarian Law such as distinction and proportionality. Of the many types of munitions employed by IDF forces during the Gaza Operation, international organisations have largely focused their criticism on munitions containing white phosphorous and flechettes.

(i) Use of Munitions Containing White Phosphorous

406. During the Gaza Operation, IDF forces used munitions containing white phosphorous, which is in common use by militaries worldwide. In particular, IDF used two different types of munitions containing white phosphorous – exploding munitions and smoke projectiles.
407. *Exploding munitions containing white phosphorous.* A small number of exploding munitions containing white phosphorous were used by the IDF during the Operation as mortar shells fire by ground forces and as rounds from naval vessels. These munitions were fired only at open unpopulated areas and were used only for marking and signalling

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rather than in an anti-personnel capacity. In one single incident, in an open uninhabited area, ammunition containing phosphorous was used by ground forces to uncover tunnel entrances that served for terrorist purposes. No exploding munitions containing white phosphorous were used in built-up areas of the Gaza Strip or for anti-personnel purposes. The restrictions on the use of incendiary weapons under Protocol III (relating to Incendiary Weapons) to the Convention on Certain Conventional Weapons (“CCW Protocol III”)²⁷⁷ were observed at all times, even though Israel is not a party to the Protocol (for further elaboration, see below).

408. None of the instances in which exploding munitions containing white phosphorous were used by the IDF during the Gaza Operation has given rise to particular criticism. Still, on 7 January 2009, although not required under international law, it was decided as a precautionary measure, in order to minimise the risk to civilians, that the IDF would cease to use such exploding munitions during the Gaza Operation. IDF forces fighting in Gaza were instructed to act accordingly.²⁷⁸
409. *Smoke projectiles containing white phosphorous.* The second and main type of munitions containing white phosphorous employed by the IDF during the Gaza Operation was smoke screening projectiles. In the course of the ground manoeuvre, the IDF used smoke shells containing felt wedges dipped in white phosphorous. These shells contained relatively small amounts of white phosphorous and were used exclusively to create smoke screens for military requirements, such as camouflaging armoured forces from anti-tank squads deployed by Hamas in Gaza’s urban areas. Smokescreens are an indispensable tool in ground manoeuvres and were extremely effective during the Gaza Operation in protecting IDF forces from Hamas’ anti-tank capabilities.
410. In fact, these smoke-screening projectiles are designed to create a protective smoke screen for battlefield purposes, and were used exclusively for this purpose by the IDF during the Gaza Operation. The smoke projectiles may, on occasion, produce incidental incendiary effects, but this does not make them incendiary weapons for purposes of international law.

²⁷⁷ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001 (hereafter “Convention on Conventional Weapons” or “CCW”), art. 1, available at [http://www.unog.ch/80256EDD006B8954/\(httpAssets\)/40BDE99D98467348C12571DE0060141E/\\$file/CCW+text.pdf](http://www.unog.ch/80256EDD006B8954/(httpAssets)/40BDE99D98467348C12571DE0060141E/$file/CCW+text.pdf). Israel is not a party to CCW Protocol III.

²⁷⁸ The investigation discovered that exploding munitions containing phosphorous were used after 7 January 2009 on two occasions, by ground forces and the Israel Navy, for marking purposes. The investigation of these two exceptions found that, while there was a deviation from the IDF precautionary instruction, in neither incident had there been a breach of international law.

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(a) International Law Applicable to the Use of Incendiary Weapons

411. The use of munitions containing white phosphorous is not prohibited by any international treaty, including CCW Protocol III. Article I of CCW Protocol III defines “incendiary weapon” as “...any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target.” Article I further expressly excludes from its purview: “...Munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems.”
412. Accordingly, although Israel is not a party to CCW Protocol III, it is clear that the use of munitions containing white phosphorous as a smokescreen is not regulated nor prohibited by it.
413. The fact sheet on white phosphorous by the Federation of American Scientists rates the lethality of white phosphorus as “low” and notes its current status as being “in use around the world,” including by the U.S. and other military forces, for a variety of purposes.²⁷⁹ Although certain NGOs criticised use of weapons containing white phosphorous by U.S. forces in Iraq, senior U.S. officials made clear that U.S. use was consistent with international law and State practice.²⁸⁰
414. Although the use of weapons containing white phosphorous for smoke-screening purposes is not prohibited by any international treaty, it is still subject to the applicable norms of the Law of Armed Conflict, including the principles of distinction and proportionality, which regulate the employment of any types of weapons during an armed conflict.

²⁷⁹ Federation of American Scientists, *White Phosphorous Fact Sheet*, 9 July 2009 (Sources: American Chemical Society, CDC, eMedicine, NATO, U.N. Department of Disarmament Affairs, U.S. Army, USGS), available at <http://www.fas.org/programs/ssp/bio/factsheets/whitephosphorusfactsheet.html>. Peter Herby, head of the Red Cross mines-arms unit, has likewise confirmed that “[i]n some of the strikes in Gaza it's pretty clear that phosphorus was used ... *But it's not very unusual to use phosphorus to create smoke or illuminate a target.* We have no evidence to suggest it's being used in any other way.” Associated Press, *IDF white phosphorus use not illegal*, The Jerusalem Post, 13 January 2009 (emphasis added), available at <http://www.jpost.com/servlet/Satellite?pagename=JPost/JPArticle/ShowFull&cid=1231866575577>; see also Human Rights Watch, *Q & A on Israel's Use of White Phosphorus in Gaza*, 10 January 2009, available at <http://www.hrw.org/en/news/2009/01/10/q-israel-s-use-white-phosphorus-gaza> (similar).

²⁸⁰ *US general defends phosphorus use*, BBC News, 30 November 2005 (noting that white phosphorus is a “legitimate tool of the military” and that it “is not a chemical weapon. It is an incendiary. And it is well within the law of war to use those weapons as they're being used, for marking and for screening”), available at <http://news.bbc.co.uk/2/hi/americas/4483690.stm>. In addition, when the United States submitted CCW Protocol III to its Senate for advice and consent in 2008, Department of Defense witnesses testified that use of white phosphorous was permissible under the Protocol.

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(b) Compliance With the Principle of Distinction

415. The obscurant smoke shells were used by the IDF for military purposes only (*e.g.* camouflaging armoured forces from anti-tank squads deployed by Hamas in Gaza's urban areas), and were not aimed at civilians. The use of smoke obscurants proved to be highly effective at cloaking IDF forces and obstructing enemy lines of sight. At no time did IDF forces have the objective of inflicting any harm on the civilian population.
416. Some have suggested that air-burst white phosphorous munitions are by nature indiscriminate because they are designed to scatter over a wide area and therefore cannot be targeted precisely at a military objective. However, smoke projectiles are not designed or intended to be lethal or destructive, and as a result they are not used for targeting purposes. Rather, they are intended to disorient and neutralise the enemy by creating obscuration of the enemy's field of view (and therefore the objective in using them depends to a large degree on achieving a wide area of effect). Indeed, white phosphorous smoke screen projectiles worked well in serving their intended objective of protecting Israeli troops during the conflict. Therefore, smoke obscurants containing white phosphorous were not used for targeting purposes and cannot be classified as an indiscriminate weapon; otherwise, any smoke-screening means would be prohibited, in contrast to the well-established practice of militaries worldwide.

(c) Compliance with the Duty to Minimise the Risk to Civilians

417. During the Gaza Operation, the IDF used smoke-screening projectiles containing white phosphorous in a manner corresponding with its duty to minimise the risk to civilians. Abstaining from using smokescreens in densely populated areas of Gaza, *i.e.* precisely in those areas where Hamas deployed most of its forces, would undoubtedly have compromised the safety of Israeli troops and would increase the risk for civilians, as a result of cross-fire. Indeed, in one incident during the combat in Tel al-Hawa on 15 January, IDF forces came under fire from both anti-tank and small arms fire, and an IDF armoured bulldozer suffered a direct hit from an anti-tank weapon. The attack was possible because no white phosphorous smokescreen had been deployed. In cases where smoke obscurants were used, they proved to be a very effective means of protecting Israeli forces and in many cases prevented the need to use explosive munitions whose impact would have been considerably more dangerous.
418. Some have suggested that IDF could have used less harmful munitions, or used the munitions in a less harmful manner, to achieve the same military objective, for example,

by using smoke munitions without white phosphorous or by firing the munitions as ground-burst rather than air-burst projectiles. However, neither of these alternatives provides the same military advantages. White phosphorous munitions have significant battlefield advantages such as the speed of deployment and the effectiveness of blocking observation and targeting systems. Targeting the munitions at the ground rather than exploding them high in the air would fail to achieve the area of dispersal required for military purposes and would actually result in much more severe damage to buildings and persons on the ground.

419. The IDF took several precautions and other measures that were appropriate with respect to these particular munitions. First, the munitions were used only for the purpose for which they were designed, *i.e.* to create smoke screens, rather than to attack personnel or destroy buildings, purposes for which IDF has a variety of more effective munitions. Second, the use of felt wedges soaked in white phosphorous tends to further reduce dispersal of the substance and its incendiary side effects as compared to exploding munitions containing white phosphorous. Third, the smoke projectiles were employed using delay fuses which release the felt components of the projectile at a distance of at least 100 metres above the ground. This method (as opposed to the use of contact fuses), is consistent with the use of the projectiles for smoke-screening purposes only. Furthermore, air-bursting the munitions at a considerable distance above ground meant that it was less likely that any person or building would be harmed by the explosions. Fourth, after reports of an incident on 15 January 2009 during combat in Tel al-Hawa in which white phosphorous smoke projectiles set fire to a UNRWA warehouse, an IDF directive was issued, effective through the end of the Gaza Operation, establishing a safety buffer of several hundred metres from sensitive sites when using smoke projectiles.
420. All these precautions may not have eliminated the risk of civilian casualties, but the Law of Armed Conflict does not require such a result. It only requires parties to minimise the risk to civilians to the extent possible, subject to the legitimate military necessities. As explained above, the use of smoke obscurants by IDF fully complied with this rule.

(d) Compliance With the Principle of Proportionality

421. The issue of proportionality turns on the reasonableness of a commander's decision to use a particular munition in a particular context, taking into account the expected military benefit and the expected collateral damage. Second-guessing the reasonableness of a commander's decision in a rapidly evolving and complex battlefield situation should not be done lightly, and must take into account the information available to the commander at

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the time of the decision (not what actually occurred) and the value of the military objective to a reasonable commander (rather than to a third-party observer). In the case of smoke munitions containing white phosphorous, the expected military benefit was that they would protect Israeli forces from attack: a compelling military objective. Against this objective, one must weigh the anticipated risk of harm to civilians and property from the use of smoke munitions, which are designed to be a non-lethal type of munition.

422. The non-lethal nature of smoke screens when compared to the effect of explosive munitions was particularly important, given that Hamas and other terrorist organisations sought to blend in with the civilian population, making it difficult or impossible to use explosive munitions without inflicting substantial civilian casualties.
423. One particularly well-known incident, involving the UNRWA warehouse facility in Tel al-Hawa, is discussed in detail in subsection V.D(2)(a)(ii) above. The incident demonstrates the reasonableness of the decision to use smoke-screening munitions containing white phosphorous in that instance, despite the fact that it ended up causing unintended collateral harm to the U.N. facility.
424. While the actual (as opposed to the anticipated) extent of damage caused by the use of munitions containing white phosphorous is not clear, Israel recognises the unfortunate reality that a number of civilians and civilian structures might have been harmed by such use during the Gaza Operation. Israel sincerely regrets every civilian injury that may have occurred, but notes that evidence regarding the extent of collateral damage caused by these munitions in Gaza is unclear.
425. Several civilians appear to have been harmed by falling white phosphorous shell casings. Absent a technical malfunction, such a shell falls empty and contains no white phosphorous or explosive mechanism. Nevertheless, a direct hit by such an object may cause injury or even death. It should be noted that IDF forces are not immune from this risk. Indeed, a few years ago an IDF soldier was killed when a shell casing from an air-burst (non-phosphorous) munition landed on him.
426. There appears to be insufficient evidence to conclude that white phosphorous caused extensive injuries to civilians in the course of the Gaza Operation.²⁸¹ While this may, in

²⁸¹ There appear to have been no documented deaths in Gaza resulting from exposure to white phosphorous itself. There have been reports of civilians receiving non-lethal burns from white phosphorous, although the number of such cases and the manner in which such burns were received is unclear. For instance, while statements by Gaza hospital officials express suspicions of white phosphorous burns in patients, they do not specify the number of cases, and acknowledge that physicians did not have the means necessary to distinguish white phosphorus burns from other types

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fact, have occurred in some cases, it is not clear to what extent this may have happened. However, concrete complaints on damages and harm caused by the use of smoke munitions containing white phosphorous are still being investigated by the IDF and any definite conclusions in this regard would be premature.

427. Finally, in addition to some civilian injuries, the use of smoke projectiles containing white phosphorous appear to have set fire to a number of civilian buildings, causing damage to several of them. Such fires were an unwelcome effect of IDF's operations, similar to other damage caused when densely populated areas become a battlefield. However, given the fact that thousands of smoke screen projectiles were launched by IDF, each projectile with 116 felt wedges, it does not appear that the damage from this use can be regarded as excessive.
428. Overall, the operational benefits of the smokescreens in protecting the safety and security of IDF troops far outweighed the anticipated risk to civilians entailed by their use. It is with regard to these expected effects, rather than the actual harm, that the proportionality analysis must be conducted. In any event, the scope of casualties and damage actually resulting from use of the smokescreen projectiles appears to have been relatively limited compared to the significant military advantage gained by smoke-screening.

(e) Investigations and Lessons Learned

429. In light of claims that the IDF made illegal use of munitions containing white phosphorous during the Gaza Operation, the IDF launched a field investigation into this matter. The investigation has now been completed and has uncovered no violations of international law, although – as explained in Section V.C(5) above – further stages of the review are ongoing.
430. After reviewing the conclusions of the investigation, the Chief of the General Staff emphasised the importance of a clear doctrine and orders on the issue of various munitions which contain phosphorous. In particular, Lt. Gen. Ashkenazi ordered that any use of phosphorous for purposes other than smoke obscuration be treated as exceptional, in order to minimise the risk to civilians. These instructions are currently being implemented in IDF orders and operational plans.

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

of burns. See Sebastian Van As et al., *Final Report: Independent Fact-Finding Mission Into Violations of Human Rights in the Gaza Strip During the Period 27.12.2008 – 18.01.2009*, Physicians for Human Rights-Israel, April 2009, at 32.

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(ii) The Use of Munitions Containing Flechettes

431. Flechettes — anti-personnel darts typically dispersed by means of an explosive shell — were also used by IDF forces during the Gaza Operation to a very limited extent. Flechettes are a legal munition, and are not prohibited under the Law of Armed Conflict or under specific conventional prohibitions or restrictions. Many armies in the world have employed them in a variety of armed conflict situations. Despite the fact that these munitions have been in widespread use around the world for decades, governments have never reached agreement to ban or even restrict the use of such weapons.²⁸²
432. Naturally, the use of flechettes (as all other weapons) must comply with the general requirements of the Law of Armed Conflict discussed above. Accordingly, the use of flechette munitions is regulated both by the IDF standing rules of engagement, as well as by specific professional instructions. These instructions are designed to ensure respect for the legal requirements of distinction and proportionality, as well as the requirement to minimise the risk to civilians.
433. In 2002, the issue of employing flechette munitions by the IDF in the course of military operations in the Gaza Strip was brought before the Israeli Supreme Court (sitting as the High Court of Justice).²⁸³ The allegation before the Court was that flechette munitions were by nature indiscriminate and therefore illegal under international law. The Court squarely rejected this argument, finding that flechettes were not covered by the CCW. More generally, the Court found that “a prohibition against the use of flechette shells has never received significant international support.” It therefore concluded that this type of weapon was not illegal under the Law of Armed Conflict.
434. The Court also refused to prohibit IDF’s use of flechettes in the Gaza Strip. In doing so, the Court observed that IDF “directives restrict the use of flechettes to circumstances under which there exists no significant chance of injuring innocent civilians, and they may only be used against those suspected of activities that will injure the IDF forces or Israeli civilians.” The Court observed that the decision whether or not to use flechettes in concrete circumstances would therefore be made by the competent field commander taking these restrictions into consideration.

²⁸² W. Hays Parks, “Means and Methods of Warfare,” 38 Geo. Wash. Int’l L. Rev. 511, at 1 (2006).

²⁸³ *Physicians for Human Rights v. OC Southern Command*, HCJ 8990/02 (27 April 2003), available at [http://www.icrc.org/IHL-NAT.NSF/46707c419d6bdfa24125673e00508145/668f8bdcfda7c7a3c12575c3002e2106/\\$FILE/HCJ%208990.02.%20PDF.pdf](http://www.icrc.org/IHL-NAT.NSF/46707c419d6bdfa24125673e00508145/668f8bdcfda7c7a3c12575c3002e2106/$FILE/HCJ%208990.02.%20PDF.pdf) (English translation).

435. Subsequent to this decision, IDF forces continued to make limited use of flechette munitions in the Gaza Strip, including during the Gaza Operation. Following the Operation, several complaints have been made concerning their use in particular instances. These claims are currently being examined by the relevant IDF authorities, and it is therefore premature to comment on those incidents. As with all other IDF investigations, however, it is certain that any findings shall be subject to review by the MAG, the Attorney General, and possibly an ultimate review by the Israeli courts.

(b) Destruction of Private Property

436. Some destruction of private property and infrastructure is an unfortunate but inescapable by-product of every armed conflict. While recognising this reality, the Law of Armed Conflict requires that the damage be justified by military necessity. For instance, Article 23(g) of the Hague Regulations of 1907 states that it is forbidden “to destroy or seize the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war.”
437. The investigations thus far reveal that although IDF forces were instructed to operate carefully at all times and to minimise collateral damage to civilian property to the extent possible, extensive damage to civilian infrastructure and personal property did occur in the course of the Gaza Operation. Much of the damage was demanded by the necessities of war and was the outcome of Hamas’ mode of operating.
438. As explained in Section V.B above, Hamas based its main line of defence on civilian infrastructure in the Gaza Strip (*i.e.* buildings, infrastructure, agricultural lands etc.), and specifically on booby-trapped structures (mostly residential), the digging of explosive tunnels and tunnels intended for the moving of fighters and weaponry. This created an above-ground and underground deployment by Hamas in the Gaza Strip’s urban areas. During the Gaza Operation, IDF troops were forced not only to fight the terrorists themselves, but also to deal with the physical infrastructure prepared in advance by Hamas and other terrorist organisations.
439. As part of this challenge, IDF forces demolished structures that threatened their troops and had to be removed. These included (1) houses which were actually used by Hamas operatives for military purposes in the course of the fighting, (2) other structures used by Hamas operatives for terrorist activity, (3) structures whose total or partial destruction was imperatively required for military necessities, such as the movement of forces from one area to another (given that many of the roads were booby-trapped), (4) agricultural

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elements used as cover for terrorist tunnels and infrastructure, and (5) infrastructure next to the security fence between Gaza and Israel, used by Hamas for operations against IDF forces or for digging tunnels into Israeli territory.

440. Despite the enormous efforts made by Hamas and other terrorist organisations, who rigged a substantial number of buildings to explode in the areas where IDF forces were present, IDF actions to destroy such buildings in advance successfully prevented their detonation while IDF forces were in them
441. In the context of this complex battlefield, Israeli forces were instructed to operate carefully at all times, and to minimise collateral damage to the extent possible. For purposes of the Law of Armed Conflict, the extent of the damage to private property and infrastructure is not itself indicative of a violation. Rather, as already explained, in each case it must be considered whether a legitimate military purpose existed and if the damage to property was proportional to this aim. Furthermore, unanticipated damage and damage caused by Hamas cannot be blamed on Israeli forces.
442. In light of the multiple allegations raised against the IDF in connection with the destruction of residential and public buildings during the conflict, the IDF launched a full investigation into allegations of excessive damage to civilian objects during the Gaza Operation. The IDF investigation (which is now being examined by the Military Advocate General) confirmed that although relatively extensive damage was caused to private property, the IDF's activities which caused this damage complied with the Law of Armed Conflict. The Law of Armed Conflict allows the destruction of private property where, as here, it is a matter of military necessity. With the exception of a single incident, which was immediately halted by the relevant Commander and was dealt with using disciplinary measures, the investigation did not find any incidents in which structures or property were damaged as "punishment" or without an operational justification.
443. The investigation showed that in all the areas of operation, the decision to authorise the demolition of houses was made only by high ranking officers. In addition, the destruction of buildings was only initiated after it was determined by the forces that they were vacant in order to minimise civilian casualties. Accordingly, as far as the investigation was able to determine, no civilians were harmed during the demolition of infrastructure and buildings by IDF forces.
444. The investigation showed that, in many cases, the preparations made by Hamas and other terrorist organisations were responsible for the significant damage caused to houses. As

explained above, unanticipated damage to some buildings occurred due to the existence of subterranean tunnels that were unknown to IDF forces. In other cases, the damage was due to the secondary explosions caused by the detonation of explosive devices or weaponry placed by Hamas within the structures. This was illustrated by an incident in which a building in one of Gaza's northern neighbourhoods was fired upon, resulting in the unexpected detonation of a chain of explosive devices planted by Hamas, damaging many other buildings in the neighbourhood.

445. It should be emphasised that IDF orders and directions, dealing with the destruction of private property and applicable in the Gaza Operation, stressed that all demolition operations should be carried out in a manner that would minimise to the greatest extent possible the damage caused to any property not used by Hamas and other terrorist organisations in the fighting. Nevertheless, due to the complex dilemmas commanders faced with regard to decisions on destruction of property in the course of fighting in Gaza, as a result of Hamas' mode of operations, one of the lessons learned was that there should be a set of clear rules in this regard that will assist commanders in taking such decisions in the future. Accordingly, the Chief of the General Staff instructed the creation of such clear regulations and orders, as well as a clear combat doctrine, with regard to demolition of infrastructure and structures.

VI. CONCLUSION

446. One of the fundamental duties of a sovereign nation is to safeguard its citizens from attack. For eight years, Israel suffered from rocket and mortar attacks by Hamas — thousands of them, directed at no one and everyone, at children and the elderly, at schools and at hospitals. In 2008, Hamas increased the range of its attacks, bringing more than 1 million Israelis within striking distance of its terrorist tactics. Israel sought repeatedly to stop these assaults, exhausting several non-military options. But, in line with its stated goals and terrorist credo, Hamas would not desist. Finally, to keep faith with its citizenry, Israel could endure these attacks no longer, and it launched the Gaza Operation to stop them. Under international law, Israel had every right to use military force to defend its civilians against Hamas' ongoing rocket and mortar attacks.
447. Israel has deep respect for the principles of international law, and for the sanctity of human life. Though the use of military force was necessary to protect its own population, the IDF still did its best to minimise civilian casualties and damages to civilian property and sensitive sites. To that end, it adopted strict and specific rules of engagement to avoid — whenever feasible — operations that could harm civilians. It issued written warnings to civilians to stay away from areas where Hamas was active. It made telephone calls to warn occupants of buildings to leave before impending attacks. It fired warning shots. It double-checked targeting decisions. It used precision weapons.
448. The scope and rigor of these precautions was extraordinary, but they were not foolproof. Under the best of circumstances, they would not have worked perfectly. And, by Hamas' specific design, the IDF did not confront the best of circumstances. It faced a systematic strategy by Hamas to put Gaza's civilian population at risk for military and political gain, to inhibit Israel from pursuing its military objectives by intermingling civilians with military targets, and to achieve propaganda gains when Israel did pursue those objectives and civilian casualties resulted.
449. International law recognises the tragic reality that innocent civilians suffer in armed conflicts. This reality is reflected in the principles of distinction and proportionality in the Law of Armed Conflict. The very fact of inquiries into those principles presupposes that civilian casualties have occurred. But the Law of Armed Conflict also recognises that soldiers and commanders in combat must make split second decisions, often in the heat of battle, with limited information, with their lives at risk. The law recognises that they sometimes make errors in judgment. And it recognises that they make errors in implementation. With the clarity of hindsight, these errors may provoke severe criticism,

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particularly when the results are tragic. But as distressing, as tragic, as many of those errors may be, they are not violations of international law — much less war crimes — so long as the soldiers and commanders were seeking legitimate military objectives, and took appropriate precautions to avoid excessive harm to civilians, based on what they knew and under the conditions they faced at the time. Israel's investigations are in progress, but the evidence thus far reflects that the IDF pursued legitimate objectives, with appropriate precautions.

450. The legality of the Gaza Operation, however, does not negate the suffering of the people of Gaza. Israel had no wish to worsen their plight. The people of Israel have great sympathy for the civilians and the families of civilians in Gaza who died or were injured, for those who lost their property and livelihoods. Israel made great efforts to avoid that harm. Unfortunately, Hamas tried in every way to increase it. By hiding its operatives and weaponry amidst the civilian population, Hamas presented Israel with a sombre choice: allow Hamas to escalate its rocket and mortar attacks on Israeli civilians or try to stop those attacks, even though Hamas' tactics created serious risks of civilian casualties in Gaza. Israel's choice to protect its citizens was warranted under international law.
451. This is no assertion of infallibility. Israel does not shy away from investigating its operations, or from filing criminal complaints where they are warranted. Since the Gaza Operation ended in January 2009, Israel has conducted extensive and comprehensive investigations into the various allegations about the conduct of its forces. These investigations continue and their findings will be subject to independent review by the MAG and the Attorney General, and also may be subject to a review by the Supreme Court. Israel is committed to holding accountable individuals who have committed offences constituting a breach of international or Israeli laws or rules, as well as to making appropriate changes in its military operations in the future. That is the appropriate course, not a rush to judgment by partisans, not the propagation of assumed or mandated conclusions, but rather a methodical exposition of the facts and a rigorous application of the law.
452. This Paper has been prepared now as part of such an exposition of the facts and application of the law, to provide important information and analysis regarding the Gaza Operation. Israel will continue to make additional information public.

VII. INDEX OF TERMS

Additional Protocol I.....	Additional Protocol I to the Geneva Convention of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts, 8 June 1977
ALS.....	Army Legal Service (United Kingdom)
APA.....	Army Prosecuting Authority (United Kingdom)
CAS.....	Close Air Support
CCW.....	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001 (also referred to as the “Convention on Conventional Weapons”)
CCW Protocol III	Protocol III (relating to Incendiary Weapons) to the CCW
CIL.....	Customary International Law
CLA.....	Coordination and Liaison Administration
EU.....	European Union
Geneva Convention I.....	First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949)
Geneva Convention IV.....	Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949)
Hague Convention IV.....	Fourth Hague Convention Respecting the Laws and Customs of War on Land (1907)
HCC.....	Humanitarian Coordination Centre
HCJ.....	High Court of Justice
IAF.....	Israel Air Force
ICJ.....	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia

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IDF	Israel Defence Forces
IED	Improvised Explosive Device
ISAF	International Security Assistance Force
JHCO	Jordan Hashemite Charity Organisation
MAG	Military Advocate General
MDM	Médecins du Monde
MPCID	Military Police Criminal Investigation Division of the IDF
MSF	Médecins Sans Frontières
NATO	North Atlantic Treaty Organisation
OCHA	United Nations Office for the Coordination of Humanitarian Affairs
OTP	Office of the Prosecutor of the ICTY
Rome Statute	Rome Statute of the International Criminal Court (1998)
U.N. BoI Report	United Nations Board of Inquiry Report into certain incidents in the Gaza Strip, 15 May 2009, U.N. Doc A/63/855–S/2009/250
UNICEF	United Nations Children’s Fund
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNSCO	United Nation Special Coordinator Office
UNTSO	United Nations Truce Supervision Organisation
USAID	United States Agency for International Development
WFP	United Nations World Food Program
WHO	World Health Organisation

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JANUARY 2010



The State of Israel

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EXECUTIVE SUMMARY

1. This Paper describes Israel's process for investigating alleged violations of the Law of Armed Conflict. It focuses in particular on investigations, legal proceedings, and lessons learned in relation to the actions of the Israeli Defence Forces (IDF) in Gaza from 27 December 2008 through 18 January 2009 (the "Gaza Operation," also known as "Operation Cast Lead").
2. The Paper supplements and updates a paper Israel released in July 2009, *The Operation in Gaza: Factual and Legal Aspects*,¹ which addressed a range of factual and legal issues related to the Gaza Operation. The earlier paper included detailed accounts of Hamas's incessant mortar and rocket attacks on Israel's civilians (some 12,000 such attacks in the 8 years prior to the Operation) and the steadily increasing range of such attacks; Hamas's suicide bomb attacks; and Hamas's smuggling of weaponry and ammunition through tunnels under the Egyptian-Gaza border, as well as Israel's attempts to address these threats through non-military means, including diplomatic overtures and urgent appeals to the United Nations.
3. *The Operation in Gaza* also set out the legal framework governing the use of force and the principles – including the principles of distinction and proportionality – that apply in such a conflict. It also described the IDF's efforts to ensure compliance with these principles during the Gaza Operation and the *modus operandi* of Hamas, in particular its abuses of civilian protections that created such acute operational dilemmas.
4. *The Operation in Gaza* also included preliminary findings of a number of the investigations established following the operation, although such investigations were, and remain, works in progress. For this reason, six months after the publication of the original paper, it is appropriate once again to take stock publicly regarding the progress made and the current findings of the investigative process. While many of these investigations are still underway, this Paper aims to present a clear and up-to-date picture of the current status of Israel's investigations.
5. Israel's system for investigating alleged violations of the Law of Armed Conflict is comparable to the systems adopted by other democratic nations, including the United Kingdom, the United States, Australia, and Canada. The Paper notes that Israel has demonstrated its ability and its commitment to pursue serious criminal charges to uphold the Law of Armed Conflict, a commitment which has been confirmed by outside observers and foreign legal systems.
6. Israel's investigative system has multiple layers of review to ensure impartiality and independence. These include the Military Advocate General's Corps (MAG), which determines whether to initiate criminal investigations and file charges against IDF soldiers. The Military Advocate General is legally independent from the military chain of

¹ *The Operation in Gaza: Factual and Legal Aspects*, available at <http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation+in+Gaza-Factual+and+Legal+Aspects.htm>.

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command. Israel's Attorney General provides civilian oversight, as any decision of the Military Advocate General on whether or not to investigate or indict may be subject to his review. Further review is available through Israel's Supreme Court either as an appeals court, or exercising judicial review over any decision of the Military Advocate General or the civilian Attorney General. Such review can be – and frequently is – initiated by a petition of any interested party, including non-governmental organisations, Palestinians, and other non-citizens.

7. The Paper describes the structure and process of operation of these various elements of Israel's investigative system in some detail, particularly in order to correct misrepresentations and inaccuracies in recent reports describing these mechanisms.²
8. Describing the application of these mechanisms to the Gaza Operation, the Paper notes that the IDF to date has launched investigations of 150 separate incidents arising from the Gaza Operation. A number of these were opened at the IDF's own initiative. Others were opened in response to complaints and reports from Palestinian civilians, local and international non-governmental organisations, and U.N. and media reports.
9. Of the 150 incidents, so far 36 have been referred for criminal investigation. To date, criminal investigators have taken evidence from almost 100 Palestinian complainants and witnesses, along with approximately 500 IDF soldiers and commanders. The Paper describes some of the challenges encountered in the conduct of the investigations, including accessing evidence from battlefield situations and the need to make arrangements, together with non-governmental organisations such as B'Tselem, to locate and interview Palestinian witnesses. To address these challenges, special investigative teams have been appointed and are currently investigating complaints arising from the Gaza Operation.
10. The Paper relates to all investigations initiated following the Gaza Operation and does not limit itself to those incidents in the Human Rights Council's Report of the U.N. Fact-Finding Mission on the Gaza Conflict, chaired by Justice Richard Goldstone (the "Human Rights Council Fact-Finding Report" or "Report"). As Israel has clarified before, Israel disagrees with the findings and recommendations of the Report, which reflect many misunderstandings and fundamental mistakes with regard to the Gaza Operation, its purposes, and Israel's legal system. This Paper, however, is not intended as a comprehensive response to the Report or a catalogue of the Report's serious inaccuracies and misstatements.
11. With respect to the incidents described in the Human Rights Council Fact-Finding Report, the Paper notes that, prior to the publication of the Report, Israel was investigating 22 of the 34 incidents it addresses. The remaining 12 incidents, none of which had previously been brought to the attention of the Israeli authorities, were promptly referred for

² Numerous assertions made by the Human Rights Council's Report of the U.N. Fact-Finding Mission on the Gaza Conflict – for example, that criminal investigations must await the completion of a military command investigation or that all command investigators are within the direct chain of command – are incorrect.

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investigation upon the Report's publication. The Paper details the various stages of investigation of these incidents. It also notes that in some cases, after reviewing all the evidence available, the Military Advocate General has concluded that there was no basis for criminal investigations. The Paper gives detailed accounts of a number of these incidents.

12. The Paper also provides updated information regarding the special command investigations initiated by the IDF Chief of General Staff after the conclusion of hostilities in Gaza. As noted in *The Operation in Gaza*, shortly after the close of the Operation, the Chief of General Staff appointed five senior field commanders to investigate the most serious allegations of wrongdoing. The Chief of General Staff recently adopted a recommendation by the Military Advocate General and initiated a sixth special investigation, to consider additional allegations and to re-examine a complaint that a command investigator could not substantiate.
13. The Paper provides updates regarding the findings of these investigations, which have, in addition to prompting criminal inquiries, further command investigations, and disciplinary proceedings, also yielded operational lessons resulting in changes already made or underway.
14. The Paper concludes by recognizing the importance of conducting the investigative process in a timely manner. At the same time, it notes the need to ensure that legal processes are conducted thoroughly and with full due process, and in a manner comparable with that of other states guided by a respect for the rule of law.

I. INTRODUCTION

1. This Paper describes Israel's process for investigating alleged violations of the Law of Armed Conflict.¹ It focuses in particular on investigations, legal proceedings, and lessons learned in relation to the actions of the Israeli Defence Forces (IDF) in Gaza from 27 December 2008 through 18 January 2009 (the "Gaza Operation," also known as "Operation Cast Lead").
2. The Gaza Operation represented a striking example of the complex and challenging asymmetric conflicts in which states are increasingly finding themselves. In such conflicts, states are forced to confront non-state actors which do not regard themselves as bound by legal or humanitarian obligations. Such actors frequently abuse these principles as a deliberate strategy, placing both their own civilian population and that of the defending state at greater risk.
3. Faced with such challenges, and the acute real-time dilemmas created by militants operating from within and behind civilian areas, the importance of legal guidance and full compliance with legal and humanitarian obligations is paramount. At the international level, this requires close dialogue and consultation between states confronting similar threats in order to share experience and to consider how established principles of law can best be applied in such complex circumstances. At the national level, it requires continuous efforts to ensure that the principles of the Law of Armed Conflict are an integral part of the training of soldiers and commanders, and that these principles guide planning and operational decisions.
4. Beyond these measures, which are generally taken prior to and during operations, extreme importance must also be given to reviewing the operation after the fact. This should include the thorough investigation of all incidents that raise questions regarding the appropriateness or lawfulness of measures used or decisions made. The complexity and scale of such operations means that inevitably there are tragic instances, mistakes, and errors of judgment.² Tragic results, including civilian death and damage to property do not necessarily mean that violations of international law have occurred. At the same time, in instances in which evidence indicates that violations have taken place, this must be fully investigated and prosecuted.
5. Israel is committed to ensuring that every such incident is fully and fairly investigated, to ensure that lessons can be learned and that, if justified, criminal or disciplinary proceedings initiated. To this end the IDF policy requires that every allegation of wrongdoing be investigated, irrespective of its source. The 150 separate incidents

¹ This Paper uses the term "Law of Armed Conflict" in its ordinary sense – describing the legal obligations of parties to an armed conflict in the course of their military operations. The term "International Humanitarian Law" is used by many commentators and countries as an interchangeable term. Israel, like many other countries, prefers the term Law of Armed Conflict.

² A harsh reminder for Israel of this reality is the fact that nearly half of its soldiers killed during the Gaza Operation were killed by IDF fire mistakenly directed towards them.

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investigated following the Gaza Operation include, as detailed later in this Paper, not only investigations opened as a result of Israel's own concerns about certain incidents but also investigations in response to complaints and reports from Palestinian residents, local and international non-governmental organisations and UN and media reports.

6. Parts II and III of this Paper provide an overview of Israel's mechanisms for investigating alleged violations of the Law of Armed Conflict. These include mechanisms operating within the IDF, but independently of the military chain of command as well as civilian oversight mechanisms including the Attorney General and the Supreme Court sitting as the High Court of Justice, with power of judicial review over every decision to prosecute or not prosecute alleged offenders. Israel's system of investigation and prosecution is comparable to that of many democratic states confronting similar challenges, and in the course of Part III reference is made to the systems other states have developed in this regard.
7. Part IV focuses specifically on the investigation of complaints alleging violations of the Law of Armed Conflict during the Gaza Operation and sets out where the investigations opened currently stand. It also addresses some of the lessons that have already been learned, including changes to operational procedures, as a result of the findings of the investigations conducted so far.

II. OVERVIEW OF ISRAEL'S SYSTEM FOR REVIEWING MISCONDUCT ALLEGATIONS

8. Israel is a democracy, with a well-developed legal system. Even though it has confronted constant and existential threats from neighbouring states and non-state actors, Israel stands committed to the rule of law. As Israel's Supreme Court has recognized:

“This is the destiny of a democracy – it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties.”³

9. Under Israel's Basic Law for the Military, the IDF is subordinate and accountable to the civilian Government. Like any other governmental authority, it is subject to the rule of law, including the applicable rules of international law. The Israeli system of justice holds the Government, including the IDF, to its legal obligations.
10. First and foremost, Israel is committed to educating state agents – in this case, IDF commanders and soldiers – of their duties and restrictions. This includes the widespread dissemination of relevant Law of Armed Conflict principles across the ranks of the IDF.⁴ When violations of those principles are suspected, the Israeli justice system is designed not only to mete out punishment and deter future violations but also to provide the opportunity for redress to parties injured by state offences. The lawlessness of an adversary, or the severity of the threat they pose, is not and cannot be an excuse for unlawful or improper conduct.
11. To ensure compliance with the rule of law, including international law and the Law of Armed Conflict, the IDF has established a system to investigate and pursue allegations of misconduct. This system, like its counterparts in many states, includes multiple components and layers of review – an internal military disciplinary procedure, a network of military police, prosecutors, and courts, and a process for oversight by civilian authorities and the judiciary. While individual components of this system – like any governmental organisation – may not always work as intended, numerous checks and balances ensure that the rule of law is upheld.

A. The Military Justice System

12. Israel's military justice system, like those of many other democracies, is part of the state's military forces but is professionally independent. Israel's Military Justice Law of 1955 established the Court Martial system and governs the investigation, indictment, and

³ *Public Committee Against Torture in Israel v. State of Israel*, HCJ 5100/94 ¶ 39 (6 September 1999).

⁴ This dissemination is particularly important since Israeli law forbids a soldier from complying with an order that is manifestly unlawful.

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prosecution of those accused of misconduct. This military justice system deals with all allegations of offences or violations of law committed by IDF personnel, including allegations of improper conduct on the battlefield.

13. The military justice system includes three main components: the Military Advocate General's Corps, the Military Police Criminal Investigation Division (MPCID), and the Military Courts.

(1) The Military Advocate General's Corps

14. The Military Advocate General's Corps is comprised of highly professional and trained lawyers, and is responsible for enforcing the rule of law throughout the IDF.⁵ It also provides advice on military, domestic, and international law to the Chief of General Staff and all divisions of the IDF.⁶ The decisions and legal opinions of the Military Advocate General are binding on all components of the military.⁷
15. Although he serves on the General Staff of the IDF, the Military Advocate General is legally independent. IDF Supreme Command Orders state that in executing his powers and authority, the Military Advocate General is "subject to no authority but the law."⁸ Thus, the Military Advocate General has no authority over him regarding legal matters. The Military Advocate General is not subject to direct orders of any superior officers, excluding the Chief of Staff in non-legal matters. As a former Military Advocate General has explained, the Military Advocate General has a unique status in the military:

"Members of the Military Advocate are not subject to the functional command orders of the command ranks that they serve, and the decisions that they make are in their exclusive discretion. The MAG is not subordinate to the Chief of Staff in respect of the exercise of his powers and is not under any command whatsoever – de jure or de facto."⁹

16. The independence of the Military Advocate General extends to every officer within the Military Advocate General's Corps. Each is subordinate only to the Military Advocate General and is not subject to direct orders by commanders outside the Corps.
17. The manner in which the Military Advocate General is appointed further evidences his independence. Under the Military Justice Law, the Minister of Defence appoints the Military Advocate General, upon a recommendation of the Chief of General Staff of the

⁵ Military Justice Law, § 178(2), (4); IDF Supreme Command Order 2.0613(2)(a).

⁶ Military Justice Law, § 178(1); IDF Supreme Command Order 2.0613(2)(b)(4).

⁷ See *Avivit Atiyah v. Attorney General*, H CJ 4723/96 ¶ 11 (29 July 1997).

⁸ IDF Supreme Command Order 2.0613(9)(A).

⁹ Menachem Finkelstein and Yifat Tomer, *The Israeli Military Legal System – An Overview of the Current Situation and a Glimpse Into the Future*, 52 AIR FORCE L. REV. 137, 140 (2002) (footnotes omitted), available at http://findarticles.com/p/articles/mi_m6007/is_2002_Wntr/ai_103136516/?tag=content:coll.

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IDF.¹⁰ Most other senior officers in the IDF are appointed directly by the Chief of General Staff.

18. The Military Advocate General's dual enforcement and advisory responsibilities parallel those of chief military lawyers in other countries, such as the United Kingdom.¹¹ The units within the Military Advocate General's Corps that issue legal guidance to the IDF and that examine and prosecute alleged crimes by IDF forces are separate from one another. The latter function of the Military Advocate General's Corps is conducted by the Chief Military Prosecutor, Military Advocates (who head regional and other prosecution units), and military prosecutors (collectively, "the military prosecution").
19. The military justice system empowers the Military Advocate General, the Chief Military Prosecutor, and the Military Advocates to direct the prosecution of soldiers for military offences identified in the Military Justice Law (such as absence without leave, conduct unbecoming an officer, and pillage), as well as criminal offences under Israel's general Penal Law.¹² When the evidence establishes a reasonable likelihood that a crime or infraction has been committed, a Military Advocate may order a prosecutor to file an indictment in the Military Courts or order a commander to hold a disciplinary hearing. Like any criminal proceeding, this process requires military prosecutors to examine the evidence carefully and to file an indictment only if there is sufficient evidence.¹³
20. In 2007, the Military Advocate General established a specialized unit within the military prosecution, the Office of the Military Advocate for Operational Affairs, to oversee all investigations and to conduct all prosecutions of alleged operational misconduct – particularly, alleged misconduct by IDF soldiers against Palestinian civilians during military operations. The mandate of the Office includes investigation and prosecution of alleged violations of the Law of Armed Conflict. The prosecutors assigned specifically to the Office have special training and expertise to address the unique difficulties in investigating and trying these kinds of cases. When necessary, prosecutors from other units supplement this unit.

(2) The Military Police Criminal Investigation Division (MPCID)

21. The MPCID is the primary entity within the IDF for investigating alleged crimes committed by soldiers. It has hundreds of trained investigators, including reservists, who are posted in different regional and specialized units. The training course of each investigator lasts about six months, including legal studies at the IDF's School of Military Law, which is under the authority of the Military Advocate General. After concluding this

¹⁰ Military Justice Law, § 177(a).

¹¹ See Part III.E below.

¹² Military Justice Law, § 280.

¹³ Under Israeli Supreme Court precedent, a criminal indictment may only be filed where a "reasonable chance to convict" exists in light of all evidence collected, including exculpatory evidence. See, e.g., *Yahav v. State Attorney*, H CJ 2534/97 (30 June 1997).

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training, each soldier is required to pass an examination conducted by a Military Advocate before he or she is authorized to serve as an MPCID investigator.¹⁴

22. The scope of the MPCID's activities is substantial. In the last five years, the unit opened almost 3,300 investigations on average each year and collected more than 11,000 testimonies. The MPCID investigates an average of 5,500 suspects and arrests an average of 1,400 people per year. In 2009, seven percent of these investigations involved Palestinian complainants.
23. Criminal investigators who handle complaints by Palestinians undergo specialized training, including training in international law. Some of these investigators are Arabic speakers, while others use Arabic interpreters, who participate in interviews with Palestinian complainants and witnesses.
24. As necessary, MPCID investigators consult with prosecutors from the Military Advocate General's Corps regarding the proper handling of an investigation. In addition, the Military Advocate General appointed a legal officer from the Military Advocate General's Corps to serve as the legal adviser of the MPCID. The legal adviser works to ensure that legal policy is assimilated in MPCID standing orders and regulations.
25. At the conclusion of an investigation, the MPCID reports to the military prosecution and transfers the file for review by a prosecutor. In many cases, the military prosecution returns the file to MPCID with concrete instructions to conduct a supplemental investigation. If no supplement is needed, a Military Advocate or the Chief Military Prosecutor decides whether to initiate criminal or disciplinary proceedings, based on the evidence available and the nature of the alleged misconduct. In cases of heightened complexity or sensitivity, this decision is made in consultation with the Military Advocate General.

(3) The Military Courts

26. The Military Courts adjudicate charges against IDF soldiers for military and other criminal offences through a Court Martial. The Courts, which include the Military Court of Appeals and several regional courts, are composed of both professional military judges and regular officers (who must have no connection to the cases they hear). Every Court Martial must include at least one professional military judge, and professionals must comprise a majority of any appellate panel.¹⁵ The Military Justice Law provides that "[i]n judicial matters, a military judge is not subject to any authority save that of the law, and is not subject in any way to the authority of his commanders."¹⁶

¹⁴ Military Justice Law, § 252(A)(3).

¹⁵ Military Justice Law, §§ 202, 216.

¹⁶ Military Justice Law, § 184. The Israeli Supreme Court has noted that the participation of regular officers in Courts Martial serves "to emphasize the common responsibility of all of those who serve in the military regarding what happens in the military." *Katz v. President of the Court Martial, Central Jurisdictional District*, HCJ 142/79 ¶ 6 (10 June 1979).

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27. Military commanders do not appoint professional military judges. Rather, an independent commission comprised of the Minister of Defence, the Minister of Justice, members of the Israeli Supreme Court and the Military Court of Appeals, and a representative of the Israeli Bar Association (among others), makes the appointments.¹⁷ Professional military judges serve in a separate military courts unit, headed by the President of the Military Court of Appeals. The cadre of professional military judges includes many civilian judges, who may preside over military proceedings as part of their military reservist duties.¹⁸ Professional military judges can be removed only for gross misconduct, under a special procedure.
28. Even though the Military Courts are located within military bases, their proceedings are generally open to the public. Military Courts may conduct proceedings *in camera* only in limited circumstances, such as when an open proceeding would jeopardize the security of the state.¹⁹ The news media can and does cover Military Court proceedings, and many judgments of the Military Courts are published on the official website of the Israeli judiciary, as well as on various public online databases. In general, the rules of evidence in the Military Courts are practically identical to the rules applicable in civilian criminal proceedings.²⁰
29. Prosecutors have the right to appeal a sentence they regard as too lenient. Traditionally, the Military Courts have dealt sternly with soldiers convicted of offences against civilians. For example, in *Military Prosecutor v. Sgt Ilin*, the Military Court of Appeals increased the sentence of a soldier convicted of looting. The court observed:
- “A soldier committing prohibited acts during armed conflict inflicts injury upon the human dignity of the conquered as well as upon the humanity of the conqueror. . . . It is clear therefore that the thunder of war and the heat of the battle actually demand reinforcement and amplification of the voice of morality”²¹
30. Likewise, in *Military Prosecutor v. Corp. Lior and Corp. Roi*, the Military Court of Appeals raised the sentences of two soldiers serving in the Military Police who were convicted of assaulting Palestinian detainees. The court concluded:
- “The respondents grossly violated their obligations as human beings, citizens of the State of Israel, as soldiers and as police officers. The respondents are part of the Israeli society, soldiers in the IDF and members of the Military Police. In their actions, they harmed each and

¹⁷ See Military Justice Law, § 187(a).

¹⁸ See Military Justice Law, §§ 185(b), 187C.

¹⁹ See Military Justice Law, § 324.

²⁰ See Military Justice Law, § 476 (establishing that evidence law applicable to criminal proceedings in civilian courts shall apply in Military Courts unless a specific provision states differently). Rules of evidence that are unique to the Military Courts must be interpreted in light of similar provisions and the principles of general evidence law. See *Isascharov v. Military Prosecutor General*, Cr.A. 5121/98 (4 May 2006).

²¹ *Military Prosecutor v. Sgt. Ilin*, C/62/03 ¶ E (23 May 2003).

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every person who is a part of these groups. The damage of their actions is not limited to the ugly act they committed. It radiates in a circular pattern – similar to a rock thrown down a well – on its entire surrounding.”²²

B. Civilian Supervision Over the Military Justice System

(1) Attorney General of Israel

31. The decision of the Military Advocate General whether or not to open a criminal investigation, as well as his decision whether or not to file an indictment, may be subject to further review by the Attorney General of the State of Israel, an independent figure of high authority.
32. For example, in *Avivit Atiyah v. Attorney General*, the Israeli Supreme Court ruled that the Attorney General could order the Military Advocate General’s Corps to change its position concerning whether to file a criminal indictment. The Court ruling has been interpreted as follows:

“[T]he power of the Attorney General to impose his opinion on the MAG will, in those cases, include the cancellation of and the filing of a charge in a court-martial. In other words, even if the MAG thinks, in these cases, that a charge ought not be filed, and the matter is brought before the Attorney General . . . the Attorney General shall be authorized to decide that a charge should be filed, and his decision shall prevail.”²³

33. A complainant or non-governmental organisation may trigger the review of the Attorney General by simply sending a letter to the Attorney General, requesting further review of the matter.

(2) Supreme Court of Israel

34. Civilian judicial review of the military system occurs in two ways. First, the Supreme Court of Israel has discretion to hear direct appeals from judgments of the Military Court of Appeals “concerning an important, difficult, or innovative legal question.”²⁴ Second, the Supreme Court, sitting as the High Court of Justice, can review and reverse a decision of the Military Advocate General, the military prosecution, and/or the Attorney General whether to investigate or file a criminal indictment concerning alleged misconduct by soldiers.
35. Any interested party (including non-governmental organisations) or any person (including non-citizens and non-residents) affected or potentially affected by a government action can petition the Supreme Court, residing as the High Court of Justice, on a claim that the

²² *Military Prosecutor v. Corp. Lior and Corp. Roi*, C/128/03 and C/146/03 ¶ 17 (21 August 2003).

²³ Finkelstein and Tomer, *supra*, at 163 (referring to precedent set in *Avivit Atiyah v. Attorney General*, HCJ 4723/96 (29 July 1997)).

²⁴ Military Justice Law, § 440I(a),(b).

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action is *ultra vires*, unlawful, or substantially unreasonable. When warranted, the Supreme Court can enjoin the Government or grant other relief. Under Israel's legal system, a ruling of the Supreme Court against the IDF or another government agency is final and binding.

36. Palestinian residents, as well as non-governmental organisations or persons representing their interests, have filed successful petitions challenging the Military Advocate General's exercise of prosecutorial discretion. Some examples include:
- The Supreme Court reversed the Military Advocate General's decision not to file criminal charges against a high-ranking field commander, and the commander ultimately was convicted on those charges.²⁵
 - During a Supreme Court hearing, the Military Advocate General's Corps consented to opening a military criminal investigation into an incident that had only previously been examined by a command investigation.²⁶
 - The Supreme Court intervened in the Military Advocate General's decision to indict a soldier and a commander for "unbecoming conduct" (rather than more serious offences), in connection with the alleged firing of a rubber bullet at the feet of a detainee.²⁷ Following the judgment, the Military Advocate General's Corps amended the indictment, charging the commander and the soldier with more serious offences.²⁸
37. In other cases, the Supreme Court has affirmed the Military Advocate General's decisions not to file charges, corroborating the Court's authority to approve, as well as disapprove, those decisions.²⁹
38. As noted above, the Court has enforced the obligation of the state and the IDF to abide by applicable law (including international law) and humanitarian standards, notwithstanding the reality and constant threat of terrorist attacks.³⁰ For example, the Court held in 2006:

²⁵ See *Jamal Abed al Kader Mahmoud Zofnan v. Military Advocate General*, HCJ 425/89 (27 December 1989).

²⁶ See *Brian Avery v. Military Advocate General*, HCJ 11343/04 (1 March 2005).

²⁷ *Ashraf Abu Rahma v. Military Advocate General*, HCJ 7195/08 (1 July 2009) ("The military justice system, which is in charge of implementing the IDF's values of conduct, must send out a determined message of consistent and decisive defence of the basic values of the society and the army, and of uncompromising enforcement in all levels – educational, commanding authority and punitive – of the fundamental principles that are shared by the Israeli society and the Israeli army and give them their ethical and humane character.").

²⁸ The amended indictment charged the commander with the offence of threats under Section 192 of Israel's Penal Law and the soldier with the crime of illegal use of a firearm in accordance with Section 85 of the Military Justice Law. Both were also charged with the offence of conduct unbecoming an officer. The case is pending in Military Court.

²⁹ See, e.g., *Iman Atrash v. Military Advocate General*, HCJ 10682/06 (18 June 2007).

³⁰ Official English translations of over 25 cases that address this issue are available at the website of Israel's Supreme Court, <http://elyon1.court.gov.il/VerdictsSearch/EnglishStaticVerdicts.html>. See, e.g., *Public Committee Against Torture in Israel v. State of Israel*, HCJ 5100/94 (6 September 1999); *Iad Ashak Mahmud Marab v. IDF Commander in West Bank*, HCJ 3239/02 (6 February 2003); *Beit Sourik Village*

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“‘Israel is not an isolated island. It is a member of an international system.’ . . . The combat activities of the IDF are not conducted in a legal void. There are legal norms – some from customary international law, some from international law entrenched in conventions to which Israel is party, and some in the fundamental principles of Israeli law – which determine rules about how combat activities should be conducted.”³¹

39. The Israeli Supreme Court has demonstrated that it can and will intercede in actual hostilities between the IDF and Palestinian terrorist organisations – including the Gaza Operation. In January 2009, while IDF forces were still fighting Hamas in Gaza, the Court reviewed two petitions by human rights groups challenging the IDF’s efforts to satisfy humanitarian obligations to Palestinian civilians.³² The Court “endeavour[ed] to examine the claims in real time, so that it may grant effective relief or arrive at an agreed settlement.”³³ In doing so, the President of the Court affirmed the Court’s jurisdiction to hear such petitions even in the midst of combat:

“Cases in which the court examines the legality of military operations while they are happening are not uncommon occurrences, in view of the reality of our lives in which we are constantly confronting terrorism that is directed against the civilian population of Israel, and in view of the need to respond to it while discharging the duties imposed by law even in times of combat. . . . [I]t is the role of the court, even in times of combat, to determine whether within the framework of the combat operations the obligation to act in accordance with legal guidelines – both within the context of Israeli law and within the context of international humanitarian law – is being upheld.”³⁴

40. Israel’s Supreme Court has earned international respect for its jurisprudence and its independence in enforcing international law. Its rulings balancing security and individual rights are highly regarded by jurists and academic scholars of international law, and have

[Footnote continued from previous page]

Council v. State of Israel, HCJ 2056/04 (30 June 2004); *Zaharan Yunis Muhammad Mara’aba v. Prime Minister of Israel*, HCJ 7957/04 (15 September 2005); *Ahmad Issa Abdalla Yassin, Bil’in Village Council Chairman v. State of Israel*, HCJ 8414/05 (15 December 2008); *Public Committee Against Torture in Israel v. State of Israel*, HCJ 769/02 (14 December 2006); *Adalah - The Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF*, HCJ 3799/02 (6 October 2005).

³¹ *Public Committee Against Torture in Israel v. State of Israel*, HCJ 769/02 ¶ 17 (14 December 2006) (quoting *Physicians for Human Rights v. Commander of IDF Forces in Gaza*, HCJ 4764/04 (30 May 2004)).

³² *Physicians for Human Rights v. Prime Minister of Israel*, HCJ 201/09 and 248/09 (19 January 2009). After examining the steps taken by the IDF and high command authorities, the Court determined that they had indeed complied with international law.

³³ *Id.* ¶ 13.

³⁴ *Id.* ¶ 12. Also during the Gaza Operation, the Supreme Court considered a petition from foreign journalists seeking to enter Gaza at military checkpoints. *Foreign Press Association in Israel v. OC Southern Command*, HCJ 9910/08 (2 January 2009). The Court affirmed that “the freedom of speech and the freedom of the press . . . have an all the more special importance” during armed hostilities, *id.* ¶ 5, but the Gaza Operation ended before the dispute was completely resolved. *Foreign Press Association in Israel v. OC Southern Command*, HCJ 643/09 (25 January 2009).

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been cited favourably by foreign courts, including the Supreme Court of Canada, the House of Lords in the United Kingdom, and the European Court of Justice.³⁵

³⁵ See, e.g., *Application Under S. 83.28 of Criminal Code*, 2004 SCC 42 ¶ 7 (Supreme Court of Canada 2004) (citing the “eloquent” statements of Israel’s Supreme Court on the importance of responding to terrorism within the rule of law); *Suresh v. Canada*, [2002] 1 S.C.R. 3, 2002 SCC (“we note that the Supreme Court of Israel sitting as the High Court of Justice and the House of Lords have rejected torture as a legitimate tool to use in combating terrorism and protecting national security”); *A and Others v. Secretary of State for Home Department*, 2 A.C. 221 ¶ 150 (U.K. House of Lords 2005) (emphasizing importance of the United Kingdom “retain[ing] the moral high ground which an open democratic society enjoys,” and thereby “uphold[ing] the values encapsulated in the judgment of the Supreme Court of Israel in *Public Committee Against Torture in Israel v. Israel* . . . [that] ‘[a]lthough a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand’”) (citation omitted); *Kadi v. Council of European Union*, 3 C.M.L.R. 41 ¶ AG 45 (European Court of Justice 2008) (quoting former President of Supreme Court of Israel regarding importance of judicial oversight of political decisions: “It is when the cannons roar that we especially need the laws It is an expression of the difference between a democratic state fighting for its life and the fighting of terrorists rising up against it. The state fights in the name of the law and in the name of upholding the law. The terrorists fight against the law, while violating it. The war against terrorism is also law’s war against those who rise up against it.”).

III. THE INVESTIGATION OF ALLEGED VIOLATIONS OF THE LAW OF ARMED CONFLICT

41. The consistent policy of the IDF has been to investigate alleged violations of the Law of Armed Conflict, regardless of the source of the allegations, and to prosecute where there is credible evidence that a violation has occurred. This policy reflects a commitment to resolve complaints against IDF personnel fairly, impartially, and effectively. Israel's Attorney General has affirmed this policy and it has been presented to the High Court of Justice for review.
42. The effectiveness of Israel's justice system has been acknowledged by international bodies. For example, the Criminal Chamber of the National Court of Spain (Audiencia Nacional) decided by a wide margin last year to discontinue a Spanish investigation into alleged IDF war crimes in the Gaza Strip. The proceedings concerned a 2002 incident during which the IDF killed the head of Hamas's military wing but also a number of civilians during an air strike. A Spanish judge had opened an inquiry into the matter pursuant to Spain's universal jurisdiction statute.
43. In closing the investigation, the Criminal Chamber of the National Court of Spain emphasised Israel's ability fully and fairly to investigate the charges itself. Contrary to the allegations raised in the Human Rights Council Fact-Finding Report, the Court held that Israeli procedures and precedents with regard to defensive strikes, and the military, civilian, and judicial review in Israel of the incident, comport with principles of international law. The court stated:

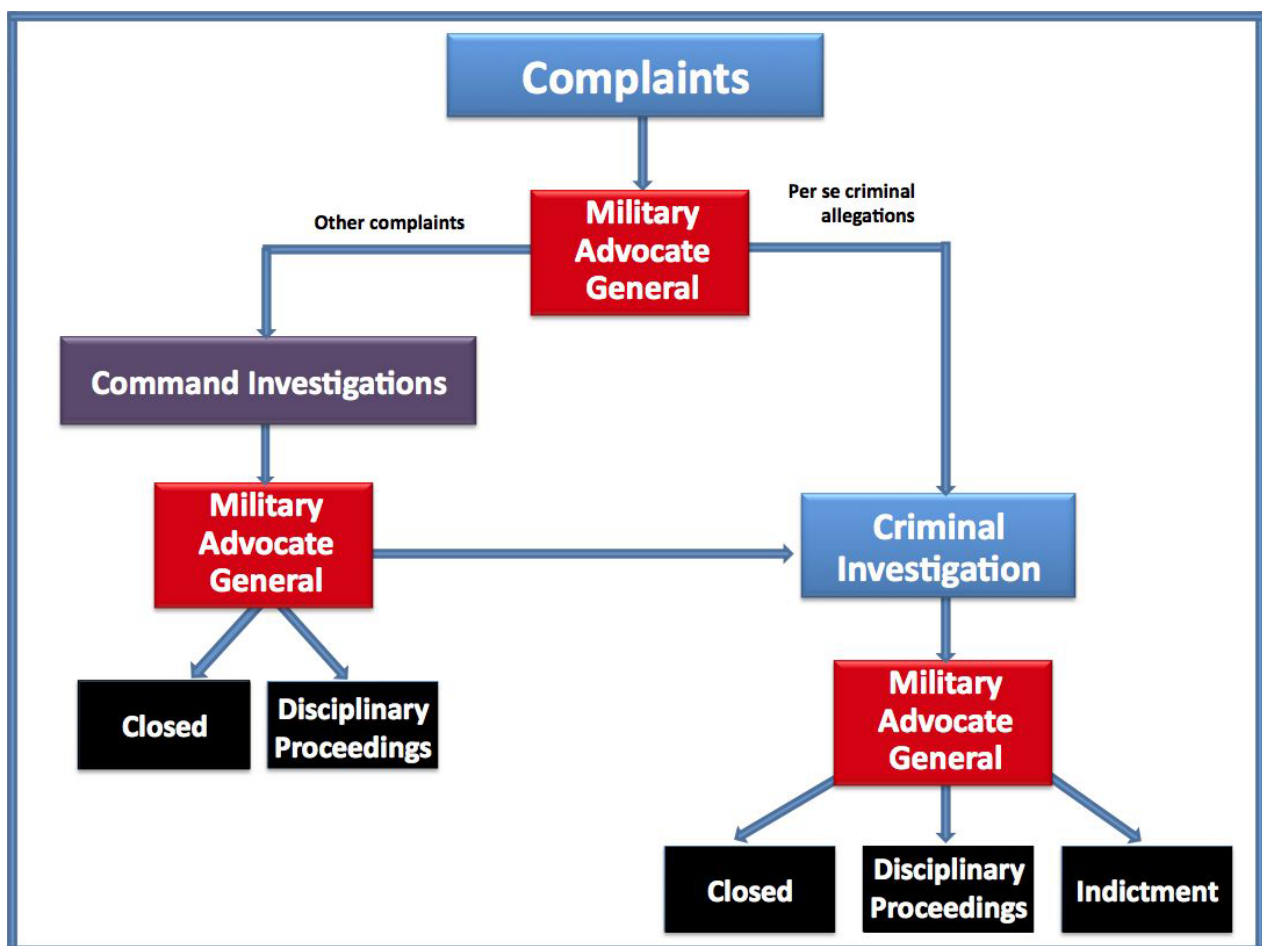
“[D]isputing the impartiality and organic and functional separation from the Executive of the Israeli Military Advocate General, the Attorney General of the State of Israel and the Investigation Commission appointed by the Israeli Government involves ignoring the existence of a social and democratic state with rule of law, where the members of the Executive and the Judiciary in question are subject to the rule of law. On the basis of those premises, there can be no doubt whatsoever with regard to the exercise of pertinent criminal actions in the event that the existence of any criminally relevant conduct on the part of the individuals who ordered, planned and carried out the bomb attack should come to light in the course of the investigations performed.”³⁶
44. In general, the investigation policy of the IDF regarding alleged violations of the Law of Armed Conflict is as follows:

³⁶ Unofficial translation of Decision no. 1/2009, 17 July 2009 (plenary), of the National Criminal Court of Appeals (“Sala de lo Penal de la Audiencia Nacional”), at 24, regarding Preliminary Criminal Proceedings no. 154/2008 of the Central Investigation Court no. 4. *See also* Appeal of the Coordinating Prosecutor (Pedro Martinez Torrijos), 6 May 2009, from the Order of the Audiencia Nacional de Madrid, 4 May 2009, in Preliminary Proceedings Case No. 157/2008 (emphasizing that Israel's investigatory system, with review by Military Advocate General, Attorney General, and Supreme Court, “fully satisfy” the requirements of “an independent and impartial system of justice”).

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- The Military Advocate General reviews complaints from a variety of sources.
- The Military Advocate General refers individual complaints for a command investigation or, when there is an allegation of *per se* criminal behaviour, for a criminal investigation.
- For those complaints referred for a command investigation, the Military Advocate General reviews the record and findings of the command investigation, along with other available material, to determine whether to recommend disciplinary proceedings and whether there is a suspicion of a criminal act – in which case the complaint is referred for a criminal investigation.
- Following a criminal investigation, the Military Advocate General reviews the entire evidentiary record to determine whether or not to file an indictment or to recommend disciplinary proceedings.

45. This process is illustrated in the following diagram:



A. Sources of Complaints

46. The IDF investigates alleged violations of the Law of Armed Conflict in essentially the same way it investigates other allegations of criminal misconduct. When a complaint raises a reasonable suspicion that a crime has been committed, the IDF opens a criminal investigation. If the investigation yields sufficient evidence to support the complaint, the

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IDF initiates either criminal or disciplinary proceedings, depending on the severity of the findings.

47. Information on alleged misconduct of soldiers reaches the IDF authorities in various ways, including:
 - formal or informal complaints by alleged victims themselves or family members;
 - complaints by commanders or soldiers who witnessed an incident;
 - reports by non-governmental organisations and the news media;
 - complaints or letters by non-governmental organisations, journalists, embassies, or international bodies; and
 - complaints forwarded to or filed directly with the Military Advocate General's Corps by the Israeli Police and other law enforcement agencies.
48. Any person may file a complaint with the Military Police at any civilian police station regarding alleged misconduct by IDF soldiers. Gaza residents can file complaints directly in writing (in Hebrew, Arabic, and English), through a non-governmental organisation acting on their behalf, or through the Military Liaison that works directly with the Palestinian civilian population.
49. In addition, the IDF independently identifies incidents that warrant further inquiry, including allegations of military misconduct reported in the news media and by other sources. The Ministry of Justice also monitors such reports and brings allegations to the attention of the relevant bodies. Regardless of the source, the IDF evaluates each complaint based on the circumstances of the case and the evidence available.

B. Military Advocate General Screening and Referral

50. The Military Advocate General and the military prosecution play a major role in the IDF's system of investigating alleged violations of the Law of Armed Conflict. Such investigations are considered extremely important, and the Military Advocate General is personally involved in the examination of many cases. The military prosecution receives all complaints of IDF misconduct for screening and review, and directly refers any complaint that alleges *per se* criminal behaviour – including allegations of maltreatment of detainees, the use of civilians as human shields, intentional targeting of civilians and looting – to the MPCID for criminal investigation.
51. Other complaints – for example, allegations of civilian deaths due to artillery shelling or the destruction of civilian property on the battlefield – may or may not constitute a criminal offence, depending on the specific circumstances. Where hostilities occur in a heavily populated area, and where enemy combatants deliberately seek to blend in with the populace, civilian casualties, unfortunately, are inevitable. Under the Law of Armed Conflict, the occurrence of damage to civilian property, and of injury, or even death of civilians, during an operational activity does not necessarily indicate nor even imply

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criminal misconduct.³⁷ Rather, criminal responsibility for violation of the Law of Armed Conflict requires evidence that military personnel *intended* to harm civilians or clearly foresaw that excessive harm to civilians would result, when balanced against the anticipated military advantage.³⁸

52. Therefore, as to this second class of complaints, before initiating a criminal investigation, the Military Advocate General must first determine whether the evidence raises a suspicion of criminal activity and warrants a referral to MPCID. As discussed below, in making his decision, the Military Advocate General evaluates the complaint itself, which may include first-hand accounts from complainants and witnesses, along with the record of evidence developed during military command investigations (also known as operational debriefings) and other materials.
53. Some of Israel's critics have misunderstood the nature of these dual investigative tracks and incorrectly assumed that all complaints first must proceed through the command investigation stage, thereby delaying criminal proceedings for months. This premise – a central premise of the Human Rights Council Fact-Finding Report³⁹ – is wrong. The Military Advocate General and the military prosecution have full authority to initiate, and do initiate, direct criminal investigations of those complaints alleging conduct that is

³⁷ See, e.g., Open Letter from Luis Moreno-Ocampo, Chief Prosecutor of International Criminal Court, "Allegations concerning War Crimes" at 4-5 (9 February 2006), available at http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf ("Under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime."); Kenneth Watkin, *Assessing Proportionality: Moral Complexity and Legal Rules*, in YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 9 (Timothy L.H. McCormack ed., 2005) ("[A]lthough civilians are not to be directly made the object of an attack, humanitarian law accepts that they may be killed or civilian property may be damaged as a result of an attack on a military objective."); W. Hays Parks, *Air War and the Law of War*, 32 A.F. L. REV. 1, 4 (1990) ("Within both the Just War Tradition and the law of war, it has always been permissible to attack combatants even though some noncombatants may be injured or killed . . ."); Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS & DEV. L.J. 143, 150 (1999) (noting that international legal doctrine of proportionality "operates in scenarios in which incidental injury and collateral damage are the foreseeable, albeit undesired, result of attack on a legitimate target"); see also NATO BOMBINGS: FINAL REPORT TO THE ICTY PROSECUTOR ¶ 51 ("Collateral casualties to civilians and collateral damage to civilian objects can occur for a variety of reasons.").

³⁸ See, e.g., Yves Sandoz, Christophe Swinarski & Bruno Zimmermann, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions 12 June 1949 (International Committee of the Red Cross, 1987), art. 51(2), ¶ 1934 ("[I]n relation to criminal law the Protocol requires intent and, moreover, with regard to indiscriminate attacks, the element of prior knowledge of the predictable result."); Rüdiger Wolfrum & Dieter Fleck, *Enforcement of International Humanitarian Law*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 675, 697 (Dieter Fleck ed., 2d ed. 2008) ("The prerequisite for a grave breach is intent; the attack must be intentionally directed at the civilian population or individual civilians, and the intent must embrace physical consequences."). The ICTY has found that for an attack to qualify as a war crime, it "must have been conducted *intentionally* in the *knowledge*, or when it was impossible not to know, that civilians or civilian property were being targeted." *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment and Opinion ¶ 42 (5 December 2003), quoted in Watkin, *supra*, at 38.

³⁹ See, e.g., Human Rights Council Fact-Finding Report ¶¶ 1820, 1831 (criticizing Israel's investigative process for "undue delay" because "proper criminal investigations can start only after the 'operational debriefing' is over"); see also *id.* ¶¶ 121, 1798, 1830.

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clearly criminal in nature. For example, in the case of the alleged firing of a rubber bullets at the feet of a detainee, the Military Advocate General conducted a direct criminal investigation immediately after the incident was published in the media, and filed an indictment within two weeks.⁴⁰ With respect to other complaints, those that are first subject to command investigations, there is no requirement that the Military Advocate General or military prosecution await a final report from the command investigator before making a criminal referral. At any point when there is a reasonable suspicion of criminal misconduct, the military prosecution may launch a criminal investigation.⁴¹

C. Command Investigations

54. Under the Military Justice Law, a command investigation is an “inquiry held in the army, in accordance with IDF orders, regarding an event which occurred during training or operational activity, or in relation to them.”⁴² The longstanding practice of the IDF, and many other militaries, is to conduct a command investigation in the field following any kind of military action. Such an investigation normally focuses on examining the performance of the forces and identifying aspects of an operation to preserve and to improve, but may also focus on specific problems that occurred. By undertaking this review, the IDF seeks to reduce future operational errors, including those potentially resulting in civilian casualties.
55. But routine post-operation investigations are not the only inquiries conducted by the IDF. In addition to these inquiries, when a complaint is filed with the Military Advocate General which does not allege *per se* criminal behaviour, the Military Advocate General requests a command investigation, to compile an evidentiary record and make a preliminary assessment of the complaint. If warranted, the command investigation will also recommend remedial measures, such as disciplinary action (which can result in prison sentences).⁴³
56. Under IDF Supreme Command Order 2.0702, the command investigator must transmit the complete record of a command investigation to the Military Advocate General’s Corps

⁴⁰ *Ashraf Abu Rahma v. Military Advocate General*, HCJ 7195/08 (1 July 2009). This case was discussed in Part II.B.2.

⁴¹ The Human Rights Council Fact-Finding Report wrongly concluded that “in practice criminal investigations do not begin before six months after the events in question.” Human Rights Council Fact-Finding Report ¶ 1830. As discussed below, the Military Advocate General directly initiated more than two dozen criminal investigations related to the Gaza Operation – all within six months. In fact, the Human Rights Council Fact-Finding Report discusses one of these investigations, which was completed less than two months after the Gaza Operation ended. *Id.* ¶ 1780; see “Military Police Investigation Concerning Statements Made at the Rabin Center: Based on Hearsay,” IDF Press Release (30 March 2009), available at <http://dover.idf.il/IDF/English/Press+Releases/09/03/3001.htm>.

⁴² Military Justice Law, § 539A(A).

⁴³ The process of internal disciplinary action in the IDF is limited to less serious offenses (those with a maximum sentence of three years or less). The Military Advocate General’s Corps may approve, change, or cancel a disciplinary judgment or punishment. Notwithstanding a disciplinary judgment, the Military Advocate General has the authority to approve a military indictment for the same offense. See Military Justice Law, § 171(B).

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upon request or automatically in certain types of cases – for example, whenever a civilian has been killed or seriously injured. The investigation of specific complaints as part of a command investigation thus serves not merely as a means to improve military performance but also as a preliminary inquiry on behalf of the Military Advocate General into potential military misconduct.

57. Further, the IDF's Chief of General Staff has the authority to initiate special (sometimes called "expert") command investigations for exceptional or complex cases. This type of investigation is conducted by a commanding officer who is outside the relevant chain of command. As with other command investigations, the results of a special command investigation must be transmitted to the Military Advocate General's Corps in appropriate circumstances – for example, whenever a civilian has been killed or seriously injured.
58. IDF Supreme Command Order 2.0702 provides requirements for command investigations, including:
 - "The command investigator shall not be limited by the rules of evidence."
 - "A soldier who is inquired in the course of a command investigation shall not be represented by a lawyer."
 - "A soldier cannot refuse a demand by a command investigator to provide information, by testimony of other manner, even if he is entitled not to provide it to an investigating entity, since it might incriminate him."⁴⁴
59. IDF Supreme Command Order 2.0702 further requires that all evidence obtained during a command investigation must be preserved. Specifically, "[m]aterials of a command investigation, including exhibits, maps, photos, and so on, shall be preserved by the commanding headquarters superior to the investigator." Thus, the Military Advocate General has the benefit of the entire record of a command investigation in those cases that are subject to review.⁴⁵
60. Contrary to some criticisms – including those of the Human Rights Council Fact-Finding Report – command investigations do not substitute *de jure* or *de facto* for criminal

⁴⁴ A statement made by a soldier during a command investigation, like all the evidence gathered, is preserved as part of the record. The Military Advocate General may use such a statement as a reason to launch a criminal investigation. A statement may also form the basis for a disciplinary proceeding. However, as in other countries that recognize the right against self-incrimination, compulsory soldier statements during a command investigation are not admissible in court except when a soldier is charged with presenting false information or obstructing an investigation.

⁴⁵ Ignoring these IDF regulations and without citing any evidence, the Human Rights Council Fact-Finding Report falsely claims that command investigations "destroy the scene of the crime," making criminal investigations "nearly impossible." Human Rights Council Fact-Finding Report ¶ 1817; *see also id.* ¶ 1830 (noting that "evidence may be corrupted" by the time a criminal investigation is launched). While some investigations have experienced delays, due to the large number of complaints submitted after the Gaza Operation, the suggestion that evidence has been lost or destroyed as a result of the process of command investigations has no basis in fact.

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investigations conducted by trained investigators.⁴⁶ They serve as a means of compiling an evidentiary record for the Military Advocate General, and enabling him, from his central vantage point, to determine whether there is a factual basis to open a criminal investigation. The Military Advocate General's review, not the command investigation, lies at the heart of the system. Many military systems rely on preliminary reviews, similar to command investigations, to assess complaints of soldier misconduct and to identify those that actually raise suspicions of criminal behaviour.⁴⁷

61. The Israeli Supreme Court has recognized that command investigations are “usually the most appropriate way to investigate an event that occurred during the course of an operational activity.”⁴⁸ Specifically, the Court observed that a command investigation is:

“usually conducted close to the time of the event, when it is still fresh in the memory of those that take part in it. It is performed in a direct and non-cumbersome manner. It is an integral part of the whole operational activity and it is well rooted into the operational experience in the IDF since its very beginning.”⁴⁹

62. At the conclusion of a command investigation, the investigator submits a written report of the findings, along with any recommendations, to the commander who commissioned the investigation and up the chain of command. As noted, the final report, along with any evidence collected, must also be transmitted to the Military Advocate General's Corps upon request or automatically in certain instances – for example, whenever a civilian has been killed or seriously injured.

D. Criminal Investigations and Prosecutions

63. The MPCID conducts criminal investigations, including investigations of complaints alleging that soldiers violated the Law of Armed Conflict. As noted above, the Military Prosecution automatically refers any complaint alleging *per se* criminal conduct to the MPCID for direct criminal investigation. With respect to other complaints, the Military Advocate General initiates a criminal investigation once he finds a reasonable suspicion of criminal activity.⁵⁰
64. To make this determination, the Military Prosecution generally relies on the complaint itself (including any statements submitted by the complainant or witnesses) together with

⁴⁶ See, e.g., Human Rights Council Fact-Finding Report ¶ 1819 (faulting command investigations for falling short of “established methods of criminal investigations such as visits to the crime scene, interviews with witnesses and victims, and assessment by reference to established legal standards”).

⁴⁷ See Part III.E below.

⁴⁸ *Mor Haim v. Israeli Defence Forces*, H CJ 6208/96 (16 September 1996). This case dealt with the appropriate manner for investigating the circumstances of the death of a soldier during an IDF operation.

⁴⁹ *Id.*

⁵⁰ When a command investigation precedes a criminal investigation, the Military Advocate General has to consult with an officer ranked Major or above. Nevertheless, the Military Advocate General alone has the authority to decide whether to initiate a criminal investigation and no officer has the authority to veto his decision.

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the report and record of a command investigation. In many cases, the Military Prosecution reviews additional materials, such as reports by non-governmental organisations and media accounts. The Military Prosecution can – and in many instances does – request additional information from the command investigator, including a supplemental investigation.

65. The Military Prosecution notifies the complainant of his decision whether to open a criminal investigation, including an explanation of the reasons. As noted, the complainant can appeal the decision both to the Attorney General and the Supreme Court.
66. When a criminal investigation is opened, the MPCID consults as needed with the relevant Military Advocate (in cases involving alleged operational misconduct against Palestinians, the Military Advocate for Operational Affairs) regarding professional and legal questions.
67. When the MPCID completes its criminal investigation, the military prosecution reviews the evidence and decides whether to file an indictment. The military prosecution exercises prosecutorial discretion according to Israeli law – similar to any prosecutor in Israel or other common law states. For example, the military prosecution will file an indictment only if it determines that there is sufficient evidence to obtain a conviction. A complainant retains the right to appeal a decision of the military prosecution. The military prosecution's exercise of prosecutorial discretion in individual cases is subject to review by both the Attorney General and the Supreme Court.
68. From January 2002 through December 2008, there were 1,467 criminal investigations into alleged misconduct by IDF soldiers, leading to 140 indictments against soldiers for alleged crimes committed against the Palestinian population. Of these indictments, as of December 2008, 103 defendants were convicted and ten cases are still pending. During 2009, 236 criminal investigations were opened, and 14 indictments were filed against officers and soldiers.
69. Historically, the Military Advocate General's Corps has aggressively prosecuted cases of soldier misconduct toward Palestinian civilians. For example, last year the military prosecution indicted a Lieutenant and a Sergeant for the improper use of force while questioning civilians during a military operation in the West Bank. A military Court Martial convicted the Lieutenant of aggravated assault, for both his own use of force as well as the use of force by his subordinate.⁵¹
70. In *Lt. Col. Geva v. Chief Military Prosecutor*, the Military Advocate General's Corps filed an appeal to seek a harsher sentence for a senior officer convicted of threatening the child of a suspected terrorist and using a civilian as a human shield. The Military Court of Appeals sided with the prosecution:

“The requirement of ‘personal example’ by IDF commanders has been, from time immemorial, at the heart of military leadership which adopted

⁵¹ *Military Prosecutor v. Lt. A.M. and Sgt. A.G.*, C/125+126/09. The Lieutenant is awaiting his sentencing hearing.

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the heritage of Gideon: ‘Look on me and do likewise.’ (Judges 7). The example given by the respondent to his subordinates, to the IDF and to society in general has been negative and the harm caused – both at home and abroad – is probably irretrievable. Given the seriousness of the failure, . . . a clear and distinct statement is warranted.”⁵²

E. The Similar Investigatory Systems of Other States

71. Under international law, the responsibility to investigate and prosecute alleged violations of the Law of Armed Conflict by a state’s military forces falls first and foremost to that state.⁵³
72. International law does not indicate the precise manner or pace at which a state should investigate alleged violations of the Law of Armed Conflict. As commentators have noted, “states do seem to enjoy broad discretion (subject to good faith requirements) in conducting ex post investigations in situations where human rights or IHL [international humanitarian law] had been allegedly breached.”⁵⁴
73. Nonetheless, the investigative systems in Israel and other democratic states (in particular, those based on the Common Law tradition) appear to have several similarities. Like Israel, countries such as the United Kingdom, the United States, Australia, and Canada have processes to screen for Law of Armed Conflict and other complaints that warrant criminal investigation, including the use of preliminary military reviews (comparable to command investigations), to assist in that determination.⁵⁵ These countries also use a courts-martial system based within the military justice framework to adjudicate criminal indictments alleging violations of the Law of Armed Conflict.⁵⁶

⁵² *Lt. Col. Geva v. Chief Military Prosecutor*, A/153/03 ¶ 50 (5 August 2004).

⁵³ See Informal Expert Paper, *The Principle of Complementarity In Practice*, at 3, available at <http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf> (“States have the first responsibility and right to prosecute international crimes.”).

⁵⁴ Amichai Cohen and Yuval Shany, *A Development of Modest Proportions: The Application of the Principle of Proportionality in the Targeted Killing Case*, 5 J. INT’L CRIM. JUS. 310, 318 (2007). The Human Rights Council Fact-Finding Report recognizes these principles. The Report notes that “the responsibility to investigate violations of international human rights and humanitarian law, prosecute if appropriate and try perpetrators belongs in the first place to domestic authorities and institutions”; and that “international justice mechanisms” should only intercede “where domestic authorities are unable or unwilling to comply with this obligation.” Human Rights Council Fact-Finding Report ¶ 1760.

⁵⁵ See, e.g., Aitken Report, *An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004*, 25 January 2008, available at http://mod.uk/NR/rdonlyres/7AC894D3-1430-4AD1-911F-8210C3342CC5/0/aitken_rep.pdf (hereafter “Aitken Report”) (describing the procedures for investigating violations of the Law of Armed Conflict in the United Kingdom); Dept. of Defense Directive No. 2311.01E, *Dept. of Defense Law of War Program*, 9 May 2006 (setting forth the procedures for the investigation of “reportable incidents” regarding of the Law of Armed Conflict in the United States).

⁵⁶ See, e.g., Victor Hansen, *Changes Made in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn From this Revolution*, 16 TUL. J. INT’L & COMP. L. 419 (2008) (describing U.S., Canadian, and United Kingdom court martial systems).

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74. When investigating high profile or other alleged incidents of soldier misconduct, these countries, like Israel, have sometimes encountered criticism concerning the pace at which their investigations or prosecutions have proceeded.
75. While there is no question that investigators should move expeditiously, the key imperative is that they take the time necessary to conduct a thorough and professional inquiry and to uncover the truth. Investigators should not sacrifice careful, complete examination of the facts nor adherence to the principles of due process.

(1) United Kingdom

76. The United Kingdom uses both criminal investigations and independent investigations within the military to examine alleged violations of the Law of Armed Conflict.⁵⁷ The Army Prosecuting Authority (APA) (which has recently been consolidated into a service-wide Prosecution Authority) traditionally has dealt with cases referred to it by the army chain of command.⁵⁸ “Legal advice is available for commanding officers and higher authorities to assist with decisions on referring appropriate cases to the APA.”⁵⁹ The Director of Army Legal Services (ALS), who is appointed by the Queen as the APA, “has responsibility for decisions on whether to direct trial for all cases referred by the military chain of command, and for the prosecution of all cases tried before courts-martial, the Standing Civilian Court and the Summary Appeal Court and for Appeals before the Courts-Martial Appeal Court and the House of Lords.”⁶⁰
77. The Director of ALS delegates these decision-making functions to “ALS officers appointed as prosecutors in the APA.”⁶¹ As in Israel, “[t]he APA is under the general superintendence of the Attorney-General and is, rightly, independent of the Army Chain of Command.”⁶² The APA (and new consolidated Prosecuting Authority) can decide not to institute court martial proceedings, refer the case back to the commanding officer to address, or direct a trial by court martial.⁶³ Like the Military Advocate General, the Director General of ALS is responsible both for providing legal advice to the army chain of command and for prosecution of offenders.⁶⁴
78. For those incidents that do not warrant direct referral to the APA, the United Kingdom military investigates allegations of misconduct within its military justice framework

⁵⁷ See generally Aitken Report.

⁵⁸ See HM Crown Prosecution Inspectorate’s Follow-Up Report on the Army Prosecuting Authority, February 2009, at 1.

⁵⁹ Aitken Report ¶ 28.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ See HM Crown Prosecution Inspectorate’s Follow-Up Report, *supra*, at 1.

⁶⁴ See British Army Website, *Army Legal Services*, available at <http://www.army.mod.uk/agc/9935.aspx>.

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through administrative actions, informal investigations, or formal investigations ordered by a Board of Inquiry.⁶⁵

(2) United States

79. To respond to alleged violations of the Law of Armed Conflict, the United States grants multiple actors within the Department of Defense and the military branches independent authority to order an investigation.⁶⁶ Specifically, the investigatory procedures in the United States follow the same general practice as in Israel. When a “reportable incident”⁶⁷ involving the Law of Armed Conflict occurs, the appropriate field commander has the duty to report the incident up the chain of command immediately.⁶⁸ Commanders receiving information about an alleged Law of Armed Conflict violation conduct a formal, or more often informal, investigation to collect evidence and assess the credibility of the allegations to determine whether a crime has been committed.⁶⁹ The report then both moves up the chain of command to the relevant Commander of the Combatant Command, and goes to the appropriate military investigation agency to determine whether to initiate a criminal investigation, as well as to the General Counsel of the Department of Defense.⁷⁰
80. One recent example of this process is the investigation of a U.S. military engagement with Taliban insurgents in Afghanistan, which resulted in civilian casualties. There, “U.S. military elements in Afghanistan began a preliminary inquiry” of the incident.⁷¹ After the preliminary inquiry, the Commander of U.S. Central Command “directed a U.S. Army General from outside Afghanistan to conduct a full investigation” who later presented his final report to the Commander and key leaders. The investigating officer’s findings and recommendations, which found no violation of the Law of Armed Conflict but suggested operational improvements, were approved by the Commander.

⁶⁵ Aitkin Report ¶ 36. Formal and informal investigations can be independent of the chain of the command but are conducted within the military.

⁶⁶ See Dept. of Defense Directive No. 2311.01E, *Dept. of Defense Law of War Program* (9 May 2006). Although the Defense Department Law of War Program Directive establishes comprehensive procedures for investigating incidents related to the Law of Armed Conflict, as developed below, investigations are typically ordered by military commanders or military investigation agencies.

⁶⁷ A “reportable incident” is defined as “[a] possible, suspected, or alleged violation of the law of war, for which there is credible information, or conduct during military operations other than war that would constitute a violation of the law of war if it occurred during an armed conflict.” See CJCSI 5810.01C ¶ 5(b).

⁶⁸ See Dept. of Defense Directive No. 2311.01E ¶¶ 6.3-6.8; CJCSI 5810.01C ¶ 7(a)-(b).

⁶⁹ See U.S. Dept. of Navy, JAG Inst. 5800.7D, *Manual of the Judge Advocate General*, ch 11 (15 March 2004); U.S. Dept. of Army, Reg. 15-6, *Procedures for Investigating Officers and Boards of Officers* (2 November 2006).

⁷⁰ See Dept. of Defense Directive No. 2311.01E ¶ 6.5.1-2; CJCSI 5810.01C ¶ 7(c).

⁷¹ UNCENCOM’s Unclassified Executive Summary, *U.S. Central Command Investigation into Civilian Casualties in Farah Province, Afghanistan on 4 May 2009*.

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81. Criminal investigations of soldier misconduct in the United States are conducted by, among others, the United States Army Criminal Investigation Command (USACIDC).⁷² The USACIDC's investigative responsibilities include alleged war crimes and in some cases crimes against coalition forces and host nation personnel.⁷³ The USACIDC does not impose time tables for investigations. Rather, like Israel, it takes the time needed to conduct a professional inquiry:

“Criminal investigations take as long as required to get to the truth and determine exactly what transpired in a particular circumstance. Although time is very important, criminal investigations are conducted to a standard not necessarily to a timetable. CID is dedicated to conducting thorough and professional criminal investigations no matter how long it takes.”⁷⁴

82. If an investigation reveals evidence of criminal wrongdoing, the ensuing criminal proceeding in the American system is a court-martial similar to the proceedings in Israel. Military prosecutors, known as Judge Advocates, are free from command influence, although as a matter of organizational structure they are subordinate to the command authority. Judge Advocates advise the “Convening Authority”⁷⁵ whether to refer cases to a court martial for trial and to approve, modify, or disapprove the findings and sentences in court martial proceedings.⁷⁶ Unlike in Israel, Judge Advocates in the United States do not file cases on their own⁷⁷ and the U.S. system does not provide for independent judicial review of the decision to commence or not commence a criminal proceeding.

(3) Australia

83. Under the Australian legal system, upon receipt of a complaint alleging soldier misconduct, a commander or supervisor may direct what is called a Quick Assessment (QA) of the incident. A QA has a similar purpose to the Israeli initial command

⁷² U.S. Army Criminal Investigation Command website, *available at* <http://www.cid.army.mil/mission.html>.

⁷³ *Id.*

⁷⁴ U.S. Army Criminal Investigation Command frequently asked questions website, *available at* <http://www.cid.army.mil/faqs.html>.

⁷⁵ “Convening Authority” is defined to include “a commissioned officer in command for the time being and successors in command.” Manual for Courts-Martial United States (2008 ed.), Rules for Courts-Martial (“R.C.M.”) 103(6), *available at* <http://www.jag.navy.mil/documents/mcm2008.pdf>.

⁷⁶ Uniform Code of Military Justice, Art. 34, Art. 64, *available at* <http://www.army.mil/references/UCMJ/>. As with the Military Advocate General, Judge Advocates are responsible both to provide legal advice to the military chain of command and to prosecute UCMJ offenders. *See* U.S. Army JAG website, *available at* <http://www.goarmy.com/JobDetail.do?id=318> (providing that JAG officers “[p]rosecute criminal cases under [UCMJ]” and “[a]dvise commanders of all levels on all legal issues as they arise”); U.S. Air Force JAG website, *available at* <http://www.afjag.af.mil/shared/media/document/AFD-080502-052.pdf> (similar).

⁷⁷ *See* R.C.M. 401, 504, 505, 601, 1107.

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investigation as it is conducted to determine whether there is any substance to allegations that may warrant further investigation or inquiry.⁷⁸

84. The Quick Assessment Officer (QAO) conducts informal interviews, collects evidence, and issues a report and recommendation. The QAO can recommend no further inquiry if he or she finds insufficient evidence of a violation of the Law of Armed Conflict or other law. Alternatively, depending on the nature of the alleged violation, the QAO can recommend a Military Commission Board of Inquiry, an Inquiry Officer inquiry, or a Routine Inquiry (all of which are conducted within the military).
85. When the QA indicates a concern regarding criminal wrongdoing, the QA Officer will recommend a criminal investigation by the Australian Defence Force Inquiry Services (ADFIS). The recommendation is referred and reviewed up the chain of command. If the matter is referred to the ADFIS, it in turn may investigate and send the matter to a hearing before a Defence Force Magistrate or a Commanding Officer or may refer the incident to the civilian police.

(4) Canada

86. Under Canada's system, complaints alleging a *prima facie* violation of the Law of Armed Conflict during an operational activity generally are referred to the National Investigation Service (NIS).⁷⁹ The NIS is accountable to the Canadian Forces Provost Marshal.⁸⁰ The NIS's mandate is to investigate "serious and sensitive matters," including alleged violations of the Law of Armed Conflict, concerning Canadian Forces serving in Canada and abroad.⁸¹ If NIS becomes aware of allegations of a potential criminal offence (through regular military police or through complaints from members of the Canadian forces or other sources), it reviews the information to determine whether a NIS investigation should be conducted.⁸² If the allegation does not appear to meet the "serious or sensitive" standard, it can be investigated by non-NIS military police or by the command unit. Prosecutions for serious charges are carried out by the Canadian Military Prosecution Service (CMPS), which is answerable to the Director of Military Prosecutions (DMP). The DMP reports to the Judge Advocate General (JAG) but exercises his or her duties and functions independently.⁸³ The CMPS provides legal advice to NIS military

⁷⁸ See The Defence Instructions (General) - Quick Assessment (Defence Instructions), Admin 67-2 (7 August 2007), available at http://www.defence.gov.au/fr/Policy/ga67_02.pdf.

⁷⁹ See Canadian Forces National Investigation Service, Annual Report 2007, dated 11 March 2008, at 11, available at <http://www.vcds.forces.gc.ca/cfpm-gpfc/cfp-ggp/nis-sne/ar-ra/2007/doc/nisar-snera-2007-eng.pdf>.

⁸⁰ The Canadian Forces National Investigation Service, CFNIS 2009-02, 1 May 2009, available at <http://news.gc.ca/web/article-eng.do?m=/index&nid=446989>.

⁸¹ The Investigation and Charging Process in the Military Justice System (National Defence Canada), available at <http://www.forces.gc.ca/jag/publications/Training-formation/ChargInves-EnqueAccu-eng.pdf>.

⁸² The Canadian Forces National Investigation Service, CFNIS 2009-02, 1 May 2009.

⁸³ Abridged Annual Report of the Director of Military Prosecutions, 2006-7, available at <http://www.forces.gc.ca/jag/publications/DMP-DPM/DMP-DPM-AR0607-eng.pdf>.

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police, reviews charge for court martial (including on grounds of sufficiency of evidence) and conducts prosecution of trials by court martial.⁸⁴

87. Matters that do not initially indicate criminal wrongdoing go to either Summary Investigations (SI) if they are minor or uncomplicated, or to a military Board of Inquiry (BOI) if they are more complex.⁸⁵ If either an SI or BOI receives evidence that reasonably relates to an allegation of criminal conduct, the proceedings must be suspended for potential criminal investigations.⁸⁶ In a BOI, a soldier can be compelled to testify, but as in Israel's command investigations, any self-incriminatory statements are inadmissible as evidence against the soldier in a court martial or trial.⁸⁷

(5) Summary

88. In sum, these military justice systems share similarities with the system in Israel. They rely on a combination of field reviews, informal and formal military investigations, and prosecutions by courts martial or their equivalent. While these other systems differ in some respects from each other and from the Israeli system, all of them nonetheless have been accepted worldwide as sufficient for investigating alleged violations of the Law of Armed Conflict. The comparisons also reflect that investigations into alleged violations of the Law of Armed Conflict can take several weeks, months, or even years. The length of time is contingent on a variety of factors and customary international law does not reflect a standard pace for conducting such investigations, much less a deadline that Israel has exceeded.

⁸⁴ Abridged Annual Report of the Director of Military Prosecutions, 2006-7.

⁸⁵ See National Defence and the Canadian Forces, Defence Administration Orders and Directives ("DAOD") 7002-1, 8 February 2002 (as modified 7 May 2007), available at <http://www.admfincs.forces.gc.ca/dao-doa/7000/7002-1-eng.asp> (purpose of BOI is "to investigate and report on matters of unusual significance or complexity"); DAOD 7002-2 8 February 2002 (as modified 7 May 2007), available at <http://www.admfincs.forces.gc.ca/dao-doa/7000/7002-2-eng.asp> (purpose of SI is "to investigate and report on matters of a minor, straightforward and uncomplicated nature").

⁸⁶ DAOD 7002-1; 7002-2 (providing that terms of reference for both SI and BOI must contain paragraphs stating "Should the BOI receive evidence that it reasonably believes relates to an allegation of a criminal act or a breach of the Code of Service Discipline, the BOI shall adjourn, the convening authority shall be notified, and the matter shall be referred to the nearest JAG representative for advice."). Like the Military Advocate General, the Canadian Judge Advocate General is responsible both to provide legal advice to the military chain of command and to prosecute criminal offenders. See National Defence and the Canadian Forces JAG website, available at <http://www.forces.gc.ca/jag/office-cabinet/law-droit-eng.asp> (providing that the JAG is responsible for being "legal advisor . . . to the Canadian Forces" on a number of issues, including "international and operational law" and "criminal law and military justice policy," and for "[p]referral of charges for tr[ia]l at courts martial" and "[p]rosecutions at courts martial").

⁸⁷ *Meade v. Her Majesty the Queen in Right of Canada* [1991] 3 F.C. 365 ¶ 9.

IV. COMPLAINTS ALLEGING VIOLATIONS OF THE LAW OF ARMED CONFLICT DURING THE GAZA OPERATION

89. Israel is aware of concerns raised regarding the Gaza Operation. As discussed in detail in *The Operation in Gaza*, and as outlined above, the deliberate strategy of Hamas to blend in with the civilian population made it difficult for the IDF to achieve the objective of the Gaza Operation – reducing the threat of deliberate attacks against Israeli civilians – while also avoiding harm to Palestinian civilians. To be sure, the IDF undertook strenuous efforts to minimise such harm. It intensively trained its personnel on the requirements of the Law of Armed Conflict. It delayed, diverted, or refrained from attacks to spare civilian life. It provided numerous and varied types of concrete warnings before launching attacks.⁸⁸ Nevertheless, Israel's efforts to comply with the Law of Armed Conflict do not lessen its regret for the loss of innocent lives and damage to civilian property.
90. Following the Gaza Operation, Israel took several concrete steps to reaffirm its commitment to thoroughly investigating, and where appropriate, prosecuting, alleged violations of the Law of Armed Conflict:
- Israel undertook to investigate every specific complaint of alleged violations during the Gaza Operation, regardless of the credibility of the source.
 - The Military Advocate General personally reviewed each complaint submitted and, when available, the record of each command investigation before deciding whether to initiate a criminal investigation.
 - The Chief of General Staff initiated six special command investigations to examine some of the most serious allegations, in addition to the other command investigations conducted.⁸⁹
 - The Military Advocate General ordered the Office of the Military Advocate for Operational Affairs to work closely with the MPCID on every criminal investigation, even before any decision on whether to file charges.
91. At the time of this Report, the IDF has investigated or is currently investigating more than 150 separate incidents that allegedly occurred during the Gaza Operation involving violations of the Law of Armed Conflict. The IDF initiated many of these investigations based on its own sources of information. Others came to the attention of the Israeli authorities through a variety of channels, either directly via complaints submitted by Palestinians and non-governmental organisations, or indirectly through media accounts and reports published by non-governmental organisations and other sources (among them, the Human Rights Council Fact-Finding Report).

⁸⁸ See *The Operation in Gaza: Factual and Legal Aspects* ¶¶ 262-65.

⁸⁹ Five special command investigations were initiated immediately after the conclusion of the Operation, and an additional special command investigation was initiated on 10 November 2009.

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92. The pace of these investigations reflects an orderly approach to uncovering the facts while at the same time safeguarding the rights of civilians and military personnel. Ideally, investigations would begin earlier, end sooner, and yield irrefutable results. But the combat and immediate post-combat environment is not ideal, and it complicates the gathering of evidence and the conduct of investigations. While the Gaza Operation concluded only one year ago, a thorough investigation takes time.
93. The unique difficulties involved in the investigation of alleged violations of the Law of Armed Conflict in the battlefield should not be ignored. They include: the inability to secure the scene for forensic and physical evidence, either during a battle or after, when the territory is under enemy control; the possible destruction of evidence during fighting and the possible manipulation of the scene by the enemy; the need to recall reserve soldiers back for questioning; the difficulty of accurately identifying the location of an incident, when it is described in local and unofficial terms and slang; and the need to locate the adversary's civilians as witnesses and overcome their natural suspicion and fear of reprisals by their authorities.⁹⁰
94. Despite these complexities, the IDF has made significant progress with the investigations and concluded many of them. To date, some investigations have resulted in prosecutions for disciplinary and criminal violations. In others, the preliminary command investigations have been concluded and the Military Advocate General is undertaking his own review to determine whether the record warrants further investigation. In some cases, the Military Advocate General found no evidence of wrongdoing and closed the investigation. As many of the investigations are subject to further review by the Military Advocate General, the Attorney General, and the Supreme Court, it is possible that different conclusions will emerge as these cases advance through Israel's justice system.
95. Israel has periodically released detailed information concerning the status of its investigations into the Gaza Operation.⁹¹ Current information about these investigations is provided in the following sections.

A. Command Investigations

(1) Five Special Command Investigations Opened Upon the Conclusion of the Gaza Operation

96. On 20 January 2009 – just two days after the conclusion of the Gaza Operation – IDF Chief of General Staff Lt. Gen. Ashkenazi ordered five special command investigations into a range of allegations raised by international and non-governmental organisations and various news media. To head the investigations, he appointed five Colonels with

⁹⁰ As discussed below, the MPCID has interviewed almost 100 Palestinians at the Erez border crossing point principally by working with non-governmental organisations acting as liaisons with the civilian population of Gaza.

⁹¹ See, e.g., *The Operation in Gaza: Factual and Legal Aspects*. Israel also posts information concerning the investigations at the Ministry of Foreign Affairs website, available at <http://www.mfa.gov.il/MFA>.

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substantial field and command expertise who were not directly involved with the incidents investigated or in the direct chain of command. These investigations were not routine field reviews. Rather, the mandates focused on five types of alleged violations of the Law of Armed Conflict, encompassing 30 individual incidents:

- Claims regarding incidents in which a large number of civilians not directly participating in the hostilities were harmed;⁹²
- Claims regarding incidents where U.N. and international facilities were fired upon and damaged during the Gaza Operation;⁹³
- Incidents involving shooting at medical facilities, buildings, vehicles and crews;⁹⁴
- Destruction of private property and infrastructure by ground forces;⁹⁵ and

⁹² The Chief of General Staff's mandate was very specific about the allegations to be investigated, requiring review of, for example, the "Attack of a senior Hamas operative Nizar Rian, allegedly resulting in the death of 15 other individuals (4 January)," "Attack of the mosque in Beit Lahia, allegedly resulting in the death of 8 individuals (3 January)," and "Attack of the mosque of Imad Aq'al, allegedly resulting in the death of 7 individuals, 4 of them minors (29 December)." The mandate provided details, when available, such as dates, location, family names and relationships, and the number and gender of individuals allegedly killed. The mandate also required an investigation into the "[d]etails regarding the orders and instructions given in the IDF (on different levels of command before and during the operation) and regarding avoidance of disproportional harm to civilians not taking active part in the hostilities, regarding safety ranges from such civilians in different circumstances and using different weapons."

⁹³ The Chief of General Staff's mandate identified with specificity four alleged incidents to be investigated – for example, the "Shooting towards Fakhura school in Jabaliyah (6 January)," and "Damage to the UNRA school as a result of a strike by the air force, allegedly resulting in the death of 3 individuals." The mandate also required investigators to gather "information regarding intentional use by Hamas of UN premises or facilities for cover or as cover for shooting" and the "information regarding the orders and instructions given in the IDF (by different command levels, before and during the operation) regarding avoidance of harm to UN and international organizations' premises, facilities, vehicles and teams." This mandate was later extended to include other incidents investigated by the United Nations Headquarters Board of Inquiry in the Gaza Strip between 27 December 2008 and 19 January 2009.

⁹⁴ The Chief of General Staff's mandate required investigations into seven specific alleged incidents, such as the "Hitting of a medical team on its way to aid a wounded bleeding person in the area of Jabel Kashef, in the north-eastern area of the Gaza Strip, resulted in the death of a doctor, Dr. Ihmad Madhoun, the paramedic Abu Hesri, and the 1 wounded person (31 December)," and "Shelling of Dababish family residence in Sheikh Raduan, during a time when the medical team was at the location in order to evacuate the wounded, as a result of which one member of the medical team was killed (3 January)." With regard to each of these incidents, the mandate directed that the investigations seek "information regarding shooting incidents from within or nearby medical premises, facilities or vehicles, and regarding intentional use by Hamas of medical premises, facilities and vehicles for the purpose of fighting, cover for shooting, movement of weapons and combatants" and the "[d]etails regarding the orders and instructions given in the IDF (on different command levels, before and during the operation) regarding avoidance of harm to medical premises, facilities, vehicles and medical teams."

⁹⁵ The Chief of General Staff's mandate required investigations into the following issues: "a. Orders and instructions given and determined by different command levels (from the headquarters to the ground forces, before and during the operation), regarding the destruction of buildings and infrastructure. b. Extent of destruction of buildings and infrastructure in the different areas, divided in accordance to: stages of the operation, operating units, types of buildings or infrastructure that were damaged, purposes of destruction, the manner in which the destruction was carried out (via engineers/method of

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- The use of weaponry containing phosphorous.⁹⁶
- 97. The investigations focused not merely on improving operational performance, but rather on assessing specific incidents of harm to civilians and protected persons or facilities. The mandates directed the command investigators to conduct detailed inquiries into, among other things, “the orders and instructions given in the IDF (at different levels, before and during the operation) regarding the avoidance of harm” – including instructions regarding “avoidance of disproportional harm to civilians not taking active part in the hostilities, regarding safety ranges for the use of different weapons from such civilians in different circumstances.”
- 98. In accordance with standard IDF procedures for command investigations, the investigators operated independently and had access to all available materials as well as the freedom to question any relevant IDF personnel. They interviewed numerous soldiers and officers, and gathered relevant documents and other materials from external sources. They reviewed operational logs, video footage and photographs from aerial vehicles, fragment analysis reports, internal military debriefings, intelligence documents, relevant rules of engagement and operational plans, and volumes of other relevant materials. Each soldier interviewed was required to cooperate with the investigation, and each did so.
- 99. The special investigations revealed some instances of intelligence and operational errors. For example, one special command investigation determined that the IDF mistakenly targeted the home of the Al-Daya family rather than a neighbouring weapons storage facility, resulting in civilian deaths. In another instance, where the lead car of a UNRWA convoy was fired upon, the investigation revealed communication errors in coordinating the movement of the convoy. To avoid these types of errors in the future, IDF Chief of General Staff Lt. Gen. Gabi Ashkenazi directed that certain standing orders be highlighted or clarified and ordered improvements in certain command operations.
- 100. The special command investigations also uncovered some instances where IDF soldiers and officers violated the rules of engagement. For example, in one case, a Brigadier

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destruction/verification of evacuation of residents) and whether the destruction was planned or spontaneous by decisions which were taken in the field in ‘real time’. c. Intelligence and operational information regarding the nature of the enemy’s offensive and defensive methods, and with regard to infrastructure of the enemy that was identified and documented by our forces, which support the operational necessity of destruction.”

⁹⁶ The Chief of General Staff’s mandate required investigations into the following issues: “a. Kinds and amount of weapons containing phosphorous, allocated to the forces before and during the operation. b. Kinds and amount of weapons containing phosphorous, actually used during the operation. c. Purpose and military needs for the use of weapons which contain phosphorous (for example – smoke screening, marking), the targets at which these weapons were fired (for example – open areas, sources of fire in built up areas), all this divided in accordance with the type of weapon. d. Professional instructions which exist with regard to every kind of these weapons. e. Rules of engagement relevant to every type of these weapons, including safety ranges which apply with regard to the firing of weapons which contain phosphorous (specifically, the existence of limitations of any kind on the firing of these weapons to populated areas). f. Deviations (if there were) from the instructions and orders with regard to the use of weapons which contain phosphorous, and the core reasons behind such exceptions.”

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General and a Colonel had authorized the firing of explosive shells which landed in a populated area, in violation of IDF orders limiting the use of artillery fire near populated areas. The Commander of the Southern Command disciplined the two officers for exceeding their authority in a manner that jeopardized the lives of others.

101. Upon completion of the special command investigations, the investigators presented their findings to the IDF Chief of General Staff, Lt. Gen. Gabi Ashkenazi, who adopted their recommendations.⁹⁷ The Chief of General Staff ordered the IDF to implement lessons learned on a broad range of matters, directing that certain standing orders be highlighted or clarified, establishing further guidelines on the use of various munitions, and instructing that steps be taken to improve coordination with humanitarian organisations and entities.
102. The Military Advocate General received the findings and evidentiary record of each special command investigation as a source of factual information to assist in the analysis of the relevant allegations. On 19 January 2010, the Military Advocate General issued his opinion, which addressed each of the five special command investigations.

(i) *Claims regarding incidents in which a large number of civilians not directly participating in the hostilities were harmed*

103. The investigation into these allegations included 7 separate incidents. Some of the findings of the special command investigation are detailed in *The Operation in Gaza*.⁹⁸
104. As to 4 of the incidents, the Military Advocate General completed his investigation and review, finding no grounds to open a criminal inquiry.⁹⁹ The investigations with regard to three incidents are still underway.¹⁰⁰ In 2 instances, due to the complexity of the circumstances, the special command investigation is still ongoing. The third incident involved the alleged strike on the Al Maquadme Mosque, which the Chief of General Staff had remanded for a new special command investigation (as discussed below).

(ii) *Claims regarding incidents where U.N. and international facilities were fired upon and damaged during the Gaza Operation*

105. The investigation into these allegations included 13 separate incidents. Some of the findings of the special command investigation are detailed in *The Operation in Gaza*.¹⁰¹

⁹⁷ See IDF Spokesperson Announcement, *Conclusion of Investigations into Central Claims and Issues in Operation Case Lead* (22 April 2009), available at <http://idfspokesperson.com/2009/04/22/idf-announcement-findings-from-cast-lead-investigations/>.

⁹⁸ *The Operation in Gaza: Factual and Legal Aspects* ¶¶ 381-403.

⁹⁹ The four incidents are: the attack resulting in the death of Hamas senior operative Nizar Ri'an and allegedly 15 other individuals; alleged attack of the mosque of Al Rabat; attack of a truck carrying oxygen tanks; and attack of Dr. Abu El Eish family residence.

¹⁰⁰ The three incidents are: the alleged attack of the Mosque of Imad Aq'al; the strike of the Al Daiya family residence; and the alleged attack of Al Maquadme Mosque.

¹⁰¹ *The Operation in Gaza: Factual and Legal Aspects* ¶¶ 330-69.

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106. The Military Advocate General reviewed the findings and entire record of this special command investigation. He also reviewed additional materials, including information in the Human Rights Council Fact-Finding Report and the Report of the United Nations Headquarters Board of Inquiry into certain incidents in the Gaza Strip Between 27 December 2008 and 19 January 2009.
107. The Military Advocate General found no basis to order criminal investigations of the thirteen incidents under review. With regard to two of these incidents, the Military Advocate General affirmed the decisions to pursue disciplinary proceedings against IDF personnel.
108. One of these incidents involved alleged damage to the UNRWA field office compound in Tel El Hawa.¹⁰² The special command investigation revealed that, during the course of a military operation in Tel El Hawa, IDF forces fired several artillery shells in violation of the rules of engagement prohibiting use of such artillery near populated areas. Based on these findings, the Commander of the Southern Command disciplined a Brigadier General and a Colonel for exceeding their authority in a manner that jeopardized the lives of others.
109. As noted in *The Operation in Gaza*, the United Nations Secretary General established a Board of Inquiry to examine a number of incidents involving damage to U.N. facilities, independent of the ongoing investigations in Israel. Israel cooperated fully with U.N. Board of Inquiry, sharing the results of its internal investigations and providing detailed information about the incidents in question. The Secretary General commended Israel for its extensive cooperation.¹⁰³
110. Following the U.N. Board of Inquiry's examination, and notwithstanding certain reservations it had with some aspects of the Board's report, Israel entered into a dialogue with the United Nations to address all issues arising from the incidents examined. On 22 January 2010, the Secretary General thanked Israel for its "cooperative approach" in these discussions and confirmed that all financial issues relating to these incidents had been satisfactorily concluded.¹⁰⁴

(iii) Incidents involving shooting at medical facilities, buildings, vehicles and crews

111. The investigation into these allegations included 10 separate incidents. Some of the findings of the special command investigation are detailed in *The Operation in Gaza*.¹⁰⁵

¹⁰² *Id.* ¶¶ 341-47.

¹⁰³ See Letter from the Secretary General to the President of the Security Council (4 May 2009), available at <http://www.unhcr.org/refworld/docid/4a292c8dd.html> (expressing "appreciation for the cooperation provided by Israel to the Board").

¹⁰⁴ U.N. Spokesperson Briefing (22 January 2010), available at <http://www.unmultimedia.org/radio/english/detail/89687.html>.

¹⁰⁵ *The Operation in Gaza: Factual and Legal Aspects* ¶¶ 370-80.

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112. The Military Advocate General found no basis to order criminal investigations of the 10 incidents under review.

(iv) *Destruction of private property and infrastructure by ground forces*

113. This investigation dealt with the general allegations that the IDF intentionally destroyed private property and civilian infrastructure during the Gaza operation. The investigation did not deal with specific incidents alleged in complaints or reports. Some of the findings of the special command investigation are detailed in *The Operation in Gaza*.¹⁰⁶
114. The Military Advocate General reviewed the findings and the entire record of the investigation. The Military Advocate General noted that according to the Law of Armed Conflict, the destruction of private property is prohibited, except where such a destruction is justified by military necessity. He also emphasised that the findings of the special investigation are consistent with Israel's obligations under the Law of Armed Conflict. In this regard, the Military Advocate General noted that the extent of destruction, by itself, cannot establish a violation of the Law of Armed Conflict.
115. Because this investigation was limited in scope and dealt with overall issues, specific incidents reported after the conclusion of the special command investigation have been referred to individual command investigations. The Military Advocate General stressed the importance of a thorough investigation of each such incident.
116. The Military Advocate General further emphasised the importance of clear regulations and orders, as well as clear combat doctrine, regarding the demolition of structures and infrastructure. The IDF has already adopted such regulations and combat doctrine.

(v) *The use of weaponry containing phosphorous*

117. This investigation dealt with the use of weapons containing phosphorous by IDF forces during the Gaza Operation. The investigation focused on the different types and number of weapons containing phosphorous used during the Operation, the purposes for which they were used, the applicable professional instructions and rules of engagement, and the extent of compliance with those instructions and rules. Some of the findings of the special command investigation are detailed in *The Operation in Gaza*.¹⁰⁷
118. The Military Advocate General reviewed the entire record of the special command investigation. With respect to exploding munitions containing white phosphorous, the Military Advocate General concluded that the use of this weapon in the operation was consistent with Israel's obligations under international law.
119. With respect to smoke projectiles, the Military Advocate General found that international law does not prohibit use of smoke projectiles containing phosphorous. Specifically, such projectiles are not "incendiary weapons," within the meaning of the Protocol on

¹⁰⁶ *Id.* ¶¶ 436-45.

¹⁰⁷ *Id.* ¶¶ 405-35.

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Prohibitions or Restrictions on the Use of Incendiary Weapons,¹⁰⁸ because they are not primarily designed to set fire or to burn. The Military Advocate General further determined that during the Gaza Operation, the IDF used such smoke projectiles for military purposes only, for instance to camouflage IDF armor forces from Hamas's anti-tank units by creating smoke screens.

120. The Military Advocate General found no grounds to take disciplinary or other measures for the IDF's use of weapons containing phosphorous, which involved no violation of the Law of Armed Conflict. Nevertheless, the Military Advocate General's opinion did not address a number of specific complaints that were received after the investigation concluded and which are being investigated separately.

(vi) Concluding observations

121. The Military Advocate General ended his opinion on the five special command investigations by underlining the IDF's commitment to compliance with the Law of Armed Conflict, as well as its intention to investigate thoroughly every alleged violation by IDF forces. He noted that the evidence gathered by the special investigations reflected great effort by the IDF to ensure such compliance and to minimize harm to civilians.
122. The Military Advocate General acknowledged that the investigations had found operational lapses and errors in the exercise of discretion. However, given the complexities of decision making under pressure, particularly when the adversary has entrenched itself within the civilian population, such mistakes do not in themselves establish a violation of the Law of Armed Conflict.
123. The Military Advocate General further emphasised the importance of implementing the operational lessons learned from the special command investigations.

(2) Additional Special Command Investigation

124. In addition to the original five special command investigations, the Military Advocate General recommended that the Chief of General Staff establish an additional special command investigation to assess certain allegations discussed in the Human Rights Council Fact-Finding Report. The Chief of General Staff agreed and, on 10 November 2009, appointed another Colonel with substantial field and command experience who was not directly involved with the incidents in question to conduct that investigation.
125. The additional special command investigation focuses on three sets of allegations from the Human Rights Council Fact-Finding Report. One set relates to the Al-Samouni residence, where an IDF attack allegedly caused the injury and death of several dozen civilians who

¹⁰⁸ Protocol III of the Convention on Prohibitions or Restrictions on the Use of Certain Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW). Israel is not a party to CCW Protocol III.

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were seeking shelter there.¹⁰⁹ Another set of allegations under review relates to claims that the IDF mistreated Palestinians detainees.¹¹⁰ A third set of allegations under review relates to an alleged attack on the Al-Maquadme Mosque.¹¹¹

126. The alleged attack of the Al-Maquadme Mosque was first examined during one of the original five special command investigations. At that time, the special command investigator concluded that the mosque had not been struck during a military operation. After reviewing the findings of the investigation, along with media accounts and reports of non-governmental organisations (some of which were published after the investigation had concluded), the Military Advocate General recommended that a new special command investigation examine the allegations again.
127. Upon conclusion of his investigation, the special command investigator will present his findings to the Military Advocate General, who will then determine whether there is suspicion of a violation of the Law of Armed Conflict warranting further investigation.

(3) Other Command Investigations

128. In addition to the special command investigations discussed above, the Military Advocate General referred complaints regarding approximately 90 incidents for command investigations. These incidents generally involve allegations of civilian injuries or deaths and destruction of civilian property during the Gaza Operation.
129. As explained above, injuries to civilians and damage to civilian property during hostilities do not, in themselves, provide grounds for opening a criminal investigation into potential violations of the Law of Armed Conflict. There must be additional circumstances to warrant a reasonable suspicion of such a violation. As also explained above, after reviewing the findings and record of a command investigation, along with the complaint and other relevant information, the Military Advocate General will decide whether to order a criminal investigation into each incident.
130. To date, the IDF has completed 45 of the approximately 90 command investigations referred by the Military Advocate General. As discussed below, after reviewing the

¹⁰⁹ See Human Rights Council Fact-Finding Report ¶¶ 712-22. The mandate required an investigation of allegations that “IDF deliberately shot civilians in the Al-Samouni residential compound in Zeitoun, and prevented the access of medical teams, as well as evacuation of the wounded,” resulting in the death of more than 20 civilians. The Military Advocate General had previously referred additional allegations related to the alleged shooting of members of the Al-Samouni family for a criminal investigation. See Human Rights Council Fact-Finding Report ¶¶ 709-11.

¹¹⁰ See Human Rights Council Fact-Finding Report ¶¶ 1107-26. The mandate required an investigation of allegations that “IDF forces held the detainees in cruel, inhumane and degrading conditions,” such “in pits, exposed to cold and bad weather conditions, handcuffed and with their eyes covered, without food or ability to relieve themselves” and “during the night in trucks, while they are handcuffed, without having enough blankets.”

¹¹¹ See Human Rights Council Fact-Finding Report ¶¶ 822-30. The mandate directed the command investigator to “examine the allegations . . . that during prayer time (between 17:00 and 18:00), an explosion had happened in the entrance to the mosque, resulting in the death of 15 civilians.”

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findings and records of command investigations along with other relevant materials, the Military Advocate General has referred 7 incidents for criminal investigations. The Military Advocate General has found that other incidents investigated raised no reasonable suspicion of a violation of the Law of Armed Conflict. Investigations into the remaining 45 incidents continue.

B. Criminal Investigations

131. To date, the Military Advocate General has already referred 36 separate incidents for criminal investigation. The Military Advocate General determined that the nature of the alleged incidents and/or the evidentiary record raised a reasonable suspicion that allegedly criminal behaviour occurred.
132. Special investigative teams of the MPCID were appointed solely for the purpose of investigating complaints stemming from the Gaza Operation. The Commander of the MPCID supervises the professional investigative teams, with involvement by the Office of the Military Advocate for Operational Matters. The teams included 16 investigators, as well as Arabic interpreters.
133. The MPCID has sought assistance from non-governmental organisations (such as B'Tselem) to help locate Palestinian complainants and witnesses and to coordinate their arrival at the Erez crossing point to Gaza, to allow interviews and questioning. To date, MPCID investigators have taken testimony from almost 100 Palestinian complainants and witnesses, along with approximately 500 IDF soldiers and commanders. They have devoted thousands of working hours to the investigations thus far.
134. Of the 36 incidents referred thus far for criminal investigation, 19 incidents involved alleged shootings towards civilians. The Military Advocate General referred most of these incidents (12) directly for criminal investigation (without requesting a command investigation or awaiting the results of one), while some of them (7) were referred after the Military Advocate General reviewed the findings and records gathered during command investigations and concluded that there was a reasonable suspicion of criminal activity by IDF forces.
135. The remaining 17 incidents involved allegations of using civilians as human shields, mistreatment of detainees and civilians, and pillage and theft. In these instances, the Military Advocate General determined that the allegations, if true, concerned events that were clearly beyond any legitimate operational activity, and therefore directly referred all of the cases to criminal investigation.
136. The allegations referred for criminal investigation came from a variety of sources, including: local and international media reports and inquiries; letters from Palestinians or their attorneys; and letters and reports from non-governmental organisations (e.g., Public Committee against Torture in Israel, Human Rights Watch, Amnesty International, Médecins Sans Frontières). Some of these incidents are also described in the Human Rights Council Fact-Finding Report. The Military Advocate General opened a number of

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direct criminal investigations after hearing reports alleging that IDF soldiers had described conduct by themselves or fellow soldiers that would violate the Law of Armed Conflict.

137. Of these 36 criminal investigations, 1 investigation has already led to an indictment and conviction of an IDF soldier.¹¹² The Military Advocate General has exercised his discretion to close 7 criminal investigations without charges because the complainants refused to give testimony and/or there was insufficient evidence of a criminal violation.¹¹³ The remaining 28 investigations are ongoing.

C. Incidents Discussed in Human Rights Council Fact-Finding Report

138. The incidents subject to command and criminal investigations discussed above include the 34 incidents addressed at length in the Human Rights Council Fact-Finding Report.¹¹⁴
139. As of 15 September 2009, when the Human Rights Council Fact-Finding Report was released, Israel was already investigating 22 of these 34 incidents. The Report brought the remaining 12 incidents to the IDF's attention for the first time – 10 of which involved alleged damage to property and 2 of which involved alleged harm to civilians. The Military Advocate General promptly referred these 12 additional incidents for investigation.¹¹⁵
140. The current status of the investigations of incidents discussed in the Human Rights Council Fact-Finding Report is as follows:
- 11 incidents are the subject of on-going criminal investigations by the MPCID (Part IV.B above). Two of these investigations were concluded, with no suspicion for criminal behaviour.

¹¹² During a search of a Palestinian residence, the soldier stole a credit card belonging to one of the occupants and subsequently used the card to withdraw the equivalent of more than \$400. Following his confession, the soldier served seven and a half months in prison. The Court Martial declared: "The crime of looting is harmful to the moral duty of every IDF soldier to keep human dignity, a dignity 'that does not depend on origin, religion, nationality, sex, status and function.' Besides, with the commission of the crime of looting, the accused harmed the 'combat moral code,' the spirit of the IDF, in using his power and his arms not for the execution of his military mission." *Military Prosecutor v. Sergeant A.K.*, S/153/09 ¶ 12 (11 August 2009).

¹¹³ As noted above, the Military Advocate General's decision to close these investigations is subject to review by the Attorney General and the Supreme Court.

¹¹⁴ The exact number of incidents addressed in the Human Rights Council Fact-Finding Report is unclear. The Report itself indicates that the Fact-Finding Mission investigated 36 incidents in Gaza. *See* Human Rights Council Fact-Finding Report ¶ 16. However, the State of Israel has been able to identify 34 separate incidents in Gaza that are discussed in the Report.

¹¹⁵ As noted earlier, the Military Advocate General recommended a sixth special command investigation to consider certain incidents discussed in the Human Rights Council Fact-Finding Report. In addition, the Military Advocate General referred one incident discussed in the Report – alleging the use of a Palestinian as a human shield – directly for criminal investigation.

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- 7 incidents were investigated as part of the special command investigations (Part IV.A.1 and Part IV.A.2 above). The Military Advocate General has requested further review of 2 of these incidents.
 - The remaining incidents were subject to regular command investigations (Part IV.A.3 above). Some of these investigations are still ongoing.
141. Regarding certain incidents discussed in the Human Rights Council Fact-Finding Report, the Military Advocate General has reviewed the entire record and concluded that there was no basis for a criminal investigation. Some examples are detailed below.

(1) Namar wells group, Salah ad-Din Street, Jabaliyah refugee camp¹¹⁶

142. When the IDF first learned about the allegations relating to the Namar wells from the Human Rights Council Fact-Finding Report, it tried to locate the wells (since the Report does not provide any coordinates). For this purpose, the Israeli Coordination and Liaison Administration (CLA) asked the Gaza Coastal Municipalities Water Utility (CMWU) to provide the exact coordinates of the facility.
143. According to the findings of the command investigation, the CMWU provided coordinates located within a closed military compound of Hamas. This compound served as a regional command and control center and was used for military training and weapons storage. Guards manned the entry to the compound and prohibited entry by unauthorized civilians. The coordinates provided for the wells and the manned entry point to the compound are illustrated in the following photograph, taken prior to the alleged incident.



- Hamas military compound, with coordinates provided for the Namar wells circled in red (Source: IDF)

¹¹⁶ See Human Rights Council Fact-Finding Report ¶¶ 975-83.

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144. The IDF attacked the compound on 27 December 2008, at 11:30. All strikes were accurate. The command investigation further determined that pre-planned attacks, such as this one, took into account the existence of sensitive sites, including water facilities, inside or near the intended target, in the decisions whether to attack the target and what precautions to use. When planning the attack on this specific military target, the IDF knew of no water facility inside the compound. The IDF did identify a water well 195 metres from the compound and took precautionary measures, which ensured that the well was not hit or damaged.
145. The command investigation revealed that although the Israeli CLA requests and receives updates from different sources on sensitive sites inside Gaza, it had no information about the Namar water wells before the operation. After the Gaza Operation, the CMWU provided the CLA information about the location of 143 water wells. According to IDF procedures and practices, had the CLA received such information before the operation, it would have been immediately reported to all relevant IDF units.
146. The Military Advocate General reviewed the findings of the command investigation, together with the additional information contained in the Human Rights Council Fact-Finding Report.
147. The Military Advocate General concluded that the Hamas military compound, where the Namar wells were located, was a legitimate military target. The Military Advocate General found that the IDF did not know of the existence of the water wells within the Hamas military compound and did not direct the strike against the water facilities.
148. The Military Advocate General took note of the fact that standing orders issued throughout the Gaza Operation strictly forbade any acts damaging water installations. Moreover, the Military Advocate General found no credible basis for the allegation that the strike was intended to deprive the civilian population of Gaza of water. To the contrary, the IDF made significant efforts to ensure that the population of Gaza had a sufficient and continuous water supply.¹¹⁷
149. Accordingly, the Military Advocate General found no basis to order a criminal investigation regarding the case.

(2) The Gaza wastewater treatment plant, Road No. 10, al-Sheikh Ejlin, Gaza City¹¹⁸

150. The IDF first learned of allegations of deliberate attacks of the Gaza wastewater treatment plant in Sheikh Ejlin from the Human Rights Council Fact-Finding.

¹¹⁷ During the actual fighting, in several instances, the IDF coordinated the movement of the Palestinian Water Authority (CMWU) maintenance teams to repair water infrastructure (beyond the repairs permitted during humanitarian windows). Additionally, five trucks of infrastructure supplies, including pumps, generators, spare parts, and purification kits, were brought into Gaza at the request of the CMWU.

¹¹⁸ See Human Rights Council Fact-Finding Report ¶¶ 962-72.

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151. The command investigation of this incident included the gathering of information from relevant commanders and officers and from ground and aerial forces. In addition, investigators received information from the Israeli CLA, which was in direct contact with Mr. Munther Shublaq, the Director of the CMWU.
152. Initial findings from the investigation were presented to the Military Advocate General, who asked for several clarifications before reaching his conclusions. The main findings of the command investigation are as follows.

(i) The date of the incident

153. Based on an analysis of aerial photographs of the wastewater treatment plant from the relevant days, it was determined that the damage to the facility occurred on 10 January 2009. In an aerial photograph taken that day, the damage to the wall of one of the basins, as well as the flow of sewage to nearby fields, can be seen for the first time.



- Aerial photograph of wastewater treatment plant in Sheikh Ejlin, 9 January 2009, with no damage visible (Source: IDF)



- Aerial photograph of wastewater treatment plant in Sheikh Ejlin, 10 January 2009, with breach of upper basin marked in red (Source: IDF)

154. The ICRC presented a preliminary report about the basin breach to the Israeli CLA on 12 January 2009. During the following days, the CLA tried to coordinate the arrival of Gaza's CMWU teams to address the situation, but these efforts did not succeed due to the fighting in the area.
155. The Director of Gaza's CMWU reported to the CLA that 50,000 cubic meters of sewage leaked from the treatment plant; and that the direction of the leak was towards the southwest, an agricultural area.

(ii) The possibility of an aerial strike

156. The wastewater treatment plant was not defined, prior to or during the operation, as a target for an aerial strike. The nearest aerial strike on the relevant dates was 1.3 kilometres away from the plant.

(iii) The possibility of a ground attack

157. Given the characteristics of the damage caused to the basin, it is unlikely that it resulted from flat-trajectory fire of the IDF. The IDF executed no high-trajectory fire towards the plant, and the operations logs identify no such target point.

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158. When the armoured forces passed near the plant, during the operation, the basin wall was already breached and the area surrounding it was flooded, thus limiting the movement of the forces in that area.

(iv) The possible causes of damage to the basin

159. The Military Advocate General reviewed the findings of the command investigation, in light of the details provided in the Human Rights Council Fact-Finding Report and the CMWU report of January 2009, entitled “Damage Assessment Report: Water and Waste Water Infrastructure and Facilities.”
160. Taking into account all available information, the Military Advocate General could not definitively rule out the possibility that IDF activity had caused the damage to the wall of the third basin of the wastewater treatment plant (which probably occurred on 10 January). At the same time, he could also not dismiss the possibility that the damage to the basin might have resulted from a deliberate action by Hamas as part of a defensive plan to hamper the movement of IDF forces in the area.
161. The Military Advocate General was able to determine that this damage did not result from an intentional and pre-planned IDF attack. In this regard, the Military Advocate General endorsed the conclusions of the command investigation that the wastewater treatment plant was not a pre-planned target and that the breaching of the basin wall and the flooding of the area with sewage significantly limited the maneuverability of IDF ground forces, especially armoured vehicles, in that area. Moreover, the Military Advocate General noted that there was no physical evidence or eyewitness testimony to support the conclusion of the Human Rights Council Fact-Finding Report.
162. Accordingly, the Military Advocate General found no reason to order a criminal investigation regarding the case.

(3) El-Bader flour mill¹¹⁹

163. With respect to the allegation of deliberate targeting of the el-Bader flour mill, the IDF conducted a command investigation, which gathered evidence from numerous sources, including relevant commanders and officers and ground and aerial forces. In addition, the investigator received information from the Israeli CLA, which was in direct contact with the owner of el-Bader flour mill, Mr. Rashad Hamada. The command investigation included several findings, which are delineated below.
164. From the outset of the Gaza Operation, the immediate area in which the flour mill was located was used by enemy armed forces as a defensive zone, due to its proximity to Hamas’s stronghold in the Shati refugee camp. Hamas had fortified this area with tunnels and booby-trapped houses, and deployed its forces to attack IDF troops operating there. For example, 200 meters south of the flour mill an IDF squad was ambushed by five Hamas operatives in a booby-trapped house; 500 meters east of the flour mill another

¹¹⁹ See Human Rights Council Fact-Finding Report ¶¶ 913-21.

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squad engaged enemy forces in a house that was also used for weapons storage; and adjacent to the flour mill, two booby-trapped houses exploded.

165. The IDF ground operation in this area began on 9 January 2009, during night time. Before the ground operation, the IDF issued early warnings to the residents of the area, included recorded telephone calls, urging them to evacuate. Such telephone calls were made to the flour mill as well.
166. While preparing for the operation, the commanders identified the flour mill as a “strategic high point” in the area, due to its height and clear line of sight. Nevertheless, in the planning stage, it was decided not to pre-emptively attack the flour mill, in order to prevent damage to civilian infrastructure as much as possible.



► El-Bader flour mill, 9 January 2009, prior to alleged incident (Source: IDF)

167. In the course of the operation, IDF troops came under intense fire from different Hamas positions in the vicinity of the flour mill. The IDF forces fired back towards the sources of fire and threatening locations. As the IDF returned fire, the upper floor of the flour mill was hit by tank shells. A phone call warning was not made to the flour mill immediately before the strike, as the mill was not a pre-planned target.
168. Several hours after the incident, and following a report about fire in the flour mill, the IDF coordinated the arrival of several fire engines to fight the fire.

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- El-Bader flour mill, 10 January 2009, following alleged incident. Fire trucks are visible on the scene. (Source: IDF)

169. The Military Advocate General reviewed the findings and the records of the command investigation and other materials. In addition, the Military Advocate General reviewed the information included in the Human Rights Council Fact-Finding Report, as well as the transcript of the public testimony of Mr. Hamada to the Fact-Finding Mission.
170. Taking into account all available information, the Military Advocate General determined that the flour mill was struck by tank shells during combat. The Military Advocate General did not find any evidence to support the assertion that the mill was attacked from the air using precise munitions, as alleged in the Human Rights Council Fact-Finding Report. The Military Advocate General determined that the allegation was not supported in the Report itself, nor in the testimony to the Fact-Finding Mission by Rashad Hamada, who had left the area prior to the incident in response to the IDF's early warnings. Photographs of the mill following the incident do not show structural damage consistent with an air attack.

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► El-Bader flour mill, 11 January 2009, following alleged incident (Source: IDF)

171. The Military Advocate General found that, in the specific circumstances of combat, and given its location, the flour mill was a legitimate military target in accordance with the Law of Armed Conflict. The purpose of the attack was to neutralize immediate threats to IDF forces.
172. The Military Advocate General did not accept the allegation in the Human Rights Council Fact-Finding Report that the purpose of the strike was to deprive the civilian population of Gaza of food. In this regard, he noted the fact that shortly after the incident, the IDF allowed Palestinian fire trucks to reach the area and extinguish the flames, as well as the extensive amount of food and flour that entered Gaza through Israel during the Gaza Operation.¹²⁰
173. Although the Military Advocate General could not conclusively determine that the flour mill was in fact used by Hamas's military operatives, there was some evidence of such use. The Military Advocate General noted that Mr. Hamada testified before the Fact-Finding Mission that after the operation he found empty bullets on the roof of the flour mill. This could not have been the result of IDF fire, since – as was evident from the findings of the command investigation – the IDF forces which occupied the mill's compound three days after the incident did not occupy the roof of the mill, where they would have been exposed to enemy fire.
174. Accordingly, the Military Advocate General found no reason to order a criminal investigation regarding the case.

¹²⁰ See *The Operation in Gaza: Factual and Legal Aspects* ¶¶ 266-82.

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(4) The house of Abu-Askar family¹²¹

175. The IDF conducted a command investigation into allegations concerning a deliberate strike of the residence of Muhammad Abu-Askar. The command investigation gathered evidence from numerous sources, including relevant commanders and officers, ground and aerial forces, and aerial photos.
176. According to the findings of the command investigation, the cellar and other parts of Mr. Abu-Askar's house were used to store weapons and ammunitions, including Grad rockets. Furthermore, the area where the house was located was frequently used as a launch area for rockets aimed at Israeli towns.
177. Before the strike, the IDF made a telephone call to Mr. Abu-Askar's house warning of the strike. The call was received by Muhammad Abu-Askar. Following this warning, all occupants immediately evacuated the premises. Moreover, the attack took place at night, when fewer civilians were likely to be in the area. There were no civilian casualties from the strike.
178. Shortly after the strike, two sons of Mr. Abu-Askar, both Hamas military operatives, were killed while they were involved in launching mortars at IDF forces.¹²²
179. The Military Advocate General reviewed the findings and the entire record of the command investigation, together with other information on the incident included in the Human Rights Council Fact-Finding Report. He also reviewed the public testimony given by Mr. Abu-Askar before the Fact-Finding Mission.
180. The Military Advocate General concluded that due to its use as a large storage facility for weapons and ammunition, including Grad missiles, the house of Muhammad Abu-Askar was a legitimate military target. The strike was not directed against the residents of the house, but rather against the weapons stored in it.¹²³
181. The Military Advocate General further determined that the attack adhered to the IDF's obligation to take precautions to minimise incidental loss of civilian life. The effectiveness of certain precautions – the timing of the attack and the use of warnings – was evident in the fact that there were no civilian casualties in the incident. The intended military advantage of eliminating a large stockpile of weapons, including long-range rockets, exceeded the anticipated harm to civilians.
182. Accordingly, the Military Advocate General found no reason to order a criminal investigation regarding the case.

¹²¹ See Human Rights Council Fact-Finding Report ¶¶ 975-85.

¹²² The circumstances of this incident were detailed in *The Operation in Gaza: Factual and Legal Aspects* ¶¶ 336-40.

¹²³ The sole basis for the claim in the Human Rights Council Fact-Finding Report that the house was a civilian target was Mr. Abu-Askar's testimony before the Fact-Finding Mission. The Mission, however, did not ask Mr. Abu-Askar any questions about the potential use of his house for military purposes.

V. CONCLUSION

183. The Gaza Operation presented complex challenges to Israel and the IDF. While the need and obligation to respond effectively to the thousands of Hamas rockets and mortars that had terrorized Israeli civilians for years was clear and acute, the strategies adopted by Hamas, and in particular its systematic entrenchment in the heart of civilian areas, created profound operational dilemmas.
184. These challenges did not end with the close of operations. A key element of respecting the Law of Armed Conflict is a commitment genuinely to review military operations after the fact, and thoroughly investigate allegations of unlawful activity. Fulfilling this commitment in the context of Gaza is demanding, and requires serious efforts to obtain evidence from battleground situations and to make arrangements to enable residents of Gaza to give their accounts. It also requires an awareness that, in complex combat situations, errors of judgment, even with tragic results, do not necessarily mean that violations of the Law of Armed Conflict have occurred.
185. A further challenge is presented by the scale of the investigations. Because Israel followed up on every allegation, regardless of whether the source was neutral, hostile, or friendly, it launched investigations into 150 separate incidents, including 36 criminal investigations opened thus far. More broadly, the six special command investigations initiated by the IDF addressed more general concerns that arose in the course of the fighting. Beyond the disciplinary and criminal proceedings that have been initiated, operational lessons from these investigations have been incorporated in IDF practice.
186. In this Paper, Israel has sought to share its investigative procedures, and has described the various mechanisms involved, including those operating independently within the military system as well as the civilian oversight provided by the Attorney General and the Supreme Court.
187. Israel recognizes the importance of engaging in dialogue and sharing best practices on the conduct of investigative proceedings with other democratic states facing similar challenges and committed to upholding the rule of law.

GAZA OPERATION INVESTIGATIONS: SECOND UPDATE

JULY 2010



The State of Israel

GAZA OPERATION INVESTIGATIONS: SECOND UPDATE

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I. INTRODUCTION AND SUMMARY

1. This Paper describes the progress and current status of investigations carried out by Israel into allegations of misconduct and violations of the Law of Armed Conflict¹ by Israel Defence Forces (“IDF”) during the military Operation in Gaza from 27 December 2008 through 18 January 2009 (the “Gaza Operation,” also known as “Operation Cast Lead”). It is intended as an update to the information presented in Israel’s reports related to the Gaza Operation previously released in July 2009 and January 2010.
2. Israel’s first report, from July 2009, entitled *The Operation in Gaza: Factual and Legal Aspects* (hereinafter “*Operation in Gaza Report*”),² described the events leading up to the Gaza Operation. These included Hamas’s incessant mortar and rocket attacks from Gaza on Israel’s civilians (some 12,000 such attacks in the eight years prior to the Operation) and the steadily increasing range and threat of such attacks; the abduction in 2006 of Israeli soldier Corporal Gilad Shalit, who remains in captivity incommunicado to this date; as well as Israel’s numerous attempts to address the terrorist threat from Gaza through non-military means, including diplomatic overtures and urgent appeals to the United Nations.³
3. The *Operation in Gaza Report* also described the IDF’s efforts to ensure compliance with the Law of Armed Conflict during the Gaza Operation, despite the significant operational challenges posed by the tactics of Hamas—in particular Hamas’s intentional use of Palestinian civilians and civilian infrastructure as a cover for launching attacks, shielding combatants, and hiding weapons.
4. The *Operation in Gaza Report* also set out in detail the legal framework governing the use of force and the rules—including the principles of distinction and proportionality—that apply to an armed conflict under international law⁴. The report also detailed the Israeli system for investigating allegations of violations of the Laws of Armed Conflict, and included preliminary findings (as of July 2009) of a number of the investigations already established following the Gaza Operation.

¹ As in the two previous reports, the term “Law of Armed Conflict” is used throughout this Paper in its ordinary sense—describing the legal obligations of parties to an armed conflict in the course of their military operations. International Humanitarian Law is used by many commentators and countries as an interchangeable term. Israel, like many other countries, prefers the term Law of Armed Conflict.

² *The Operation in Gaza Report: Factual and Legal Aspects* (July 2009), available at http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Hamas+war+against+Israel/Operation_in_Gaza-Factual_and_Legal_Aspects.htm.

³ *Id.* ¶¶ 36-81.

⁴ *Id.* ¶¶ 27-35.

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5. In January 2010 Israel released an update to the *Operation in Gaza Report* (the “January 2010 Update”).⁵ That update provided detailed information on Israel’s various mechanisms for reviewing allegations of violations of the Law of Armed Conflict; it also compared the Israeli investigative systems for military activities with the analogous systems of other democracies (the United Kingdom, the United States, Canada, and Australia)⁶ and explained how Israel was addressing specific complaints alleging violations of the Law of Armed Conflict during the Gaza Operation.
6. The *January 2010 Update* described in detail the multiple layers of review in Israel’s investigative system that ensure thoroughness, impartiality, and independence. At the heart of the military justice system is the Military Advocate General (“MAG”), who is legally independent from the military chain of command. When allegations of violations of the Law of Armed Conflict are identified by or brought to the attention of the MAG, in situations that suggest *per se* criminal behavior, the MAG will refer a case immediately for criminal investigation. In other cases, the MAG may first review the findings of a command investigation or in its absence request that one be conducted. The MAG will examine the information gathered in the command investigation, together with the complaint received and all additional publicly available materials, before determining whether to refer the case to criminal investigation.
7. Israel’s Attorney General provides for civilian oversight, as decisions of the MAG on whether or not to investigate or indict may be subject to his review. As noted in the *January 2010 Update*, judicial review is available through Israel’s Supreme Court sitting as the High Court of Justice exercising oversight over any decision of the MAG and the civilian Attorney General. Such Supreme Court review can be initiated by a petition of any interested party, including Palestinians who live in Gaza and non-governmental organizations (“NGOs”).⁷
8. The *January 2010 Update* reviewed progress made in the investigations as of January 2010, including updates on five special command investigations detailed in the *Operation in Gaza Report*.⁸ The *January 2010 Update* also noted that a sixth special command investigation was initiated in November 2009 to review three specific allegations in the *Report of the U.N. Human Rights Council Fact-Finding Mission on the Gaza Conflict*, chaired by Justice Richard Goldstone

⁵ *Gaza Operation Investigations: An Update* (January 2010), available at <http://www.mfa.gov.il/NR/rdonlyres/8E841A98-1755-413D-A1D2-8B30F64022BE/0/GazaOperationInvestigationsUpdate.pdf>.

⁶ *January 2010 Update* ¶¶ 71-88.

⁷ See, for example, *January 2010 Update*, ¶ 36.

⁸ *January 2010 Update* ¶¶ 96-123.

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(hereinafter “*HRCFF Report*”).⁹ Israel opened numerous other criminal and command investigations to investigate and assess allegations regarding the Gaza Operation.¹⁰

9. The current Paper provides information regarding the additional steps Israel has taken, and is taking, to conduct investigations into allegations relating to the Gaza Operation. This Paper will not repeat the extensive information previously provided in the two prior reports nor will it attempt to cover all of the investigations that Israel has opened in this regard. Instead, this report provides an overview of the progress of the major investigations over the last six months, including information on investigations relating to specific incidents discussed in the *HRCFF Report*. In addition, this Paper includes a summary of some of the changes in military operational procedures that Israel has made, or is making, to implement the lessons learned as a result of the Gaza Operation.
10. Israel’s numerous investigations have produced significant results, particularly during the last several months. Since the *January 2010 Update*, Israel’s Military Police Criminal Investigative Division (“MPCID”) has opened 11 additional criminal investigations, resulting in a total of 47 criminal investigations initiated so far into specific incidents relating to the Gaza Operation. Some of the investigations have resulted in criminal indictments and trials: two IDF soldiers were recently indicted for compelling a Palestinian minor to assist them in a manner that put the minor at risk; the MAG has also filed criminal charges in the case of an IDF soldier who is suspected of killing a Palestinian civilian who was walking with a group of civilians towards an IDF position. These cases are in addition to an earlier indictment and conviction of an IDF soldier for the crime of looting, as reported in the *January 2010 Update*.¹¹
11. Several other investigations have resulted in military disciplinary actions. An IDF Brigadier General and a Colonel have been disciplined for approving the use of explosive shells in violation of the safety distances required in urban areas. An IDF Lieutenant Colonel was disciplined for permitting a Palestinian civilian to enter a structure where terrorist operatives were present. In addition, an IDF officer was severely reprimanded and two other officers were sanctioned for failing to exercise appropriate judgment during an incident that resulted in civilian casualties in the Al-Maqadmah mosque.
12. At the same time, the MAG has concluded his review of a number of other MPCID criminal and command investigations without initiating criminal charges or disciplinary measures, after concluding that the investigations did not establish any

⁹ *Human Rights Council Fact-Finding Report* (25 September 2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>.

¹⁰ *January 2010 Update* ¶¶124-27.

¹¹ *Id.* ¶ 137 & n. 112.

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violations of the Law of Armed Conflict or IDF procedures. A number of other allegations of military wrongdoing are still under investigation.

13. The IDF has also implemented operational changes in its orders and combat doctrine designed to further minimize civilian casualties and damage to civilian property in the future. In particular, the IDF has adopted important new procedures designed to enhance the protection of civilians in urban warfare, for instance by further emphasizing that the protection of civilians is an integral part of an IDF commander's mission. While the majority of the issues addressed in the new procedures were already embedded in various operational orders and guidelines in existence prior to the Operation, the new procedures demand even more comprehensive protections, such as the integration of a Humanitarian Affairs Officer in each combat unit beginning at the battalion level and above. In addition, the IDF has adopted an order defining new procedures to regulate the destruction of private property in cases of military necessity.
14. Israel has made extensive efforts to conduct thorough and independent investigations of allegations of misconduct by the IDF during the Gaza Operation. In this regard, Israel has developed mechanisms to overcome some of the challenges inherent in conducting investigations into operational activity in the context of an armed conflict, including the challenges of locating witnesses in Gaza and addressing general and often second-hand allegations of wrongdoing.
15. While the State of Israel is confident in the thoroughness, impartiality, and independence of its investigatory system of alleged violations of the Law of Armed Conflict, in light of criticism raised in certain reports regarding these mechanisms, the Government of Israel has recently mandated an independent public commission to examine the conformity of Israel's mechanisms for investigating complaints raised in relation to violations of the Law of Armed Conflict with its obligations under international law. The Commission, headed by retired Justice of the Supreme Court Yaakov Turkel, is composed of three distinguished independent experts and two renowned international observers ("Turkel Commission").
16. This paper is structured as follows: Section II outlines the progress of investigations since the *January 2010 Update*. Section III describes the results and status of several specific investigations, including investigations into incidents mentioned in the *HRCFF Report*. Section IV describes changes in military operational guidelines, based on Israel's assessment of the Gaza Operation. Finally, Section V describes the establishment of the Turkel Commission and its mandate.

II. PROGRESS OF INVESTIGATIONS SINCE JANUARY 2010

17. Over the past six months, Israel's military justice system has continued to make progress in its investigations of allegations of wrongdoing by IDF forces during the Gaza Operation. As reported in January 2010, Israel has launched over 150 military investigations, including both MPCID criminal investigations and command investigations. This Paper highlights the results of some of the investigations that have been completed and the decisions that have been made by the MAG. As previously explained, decisions of the MAG may be subject to review by the Attorney General and by Israel's Supreme Court.
18. The facts described in this Paper demonstrate that the scope of Israel's investigations into the Gaza Operation has gone well beyond focusing on individual soldiers. In addition to the criminal indictments of IDF soldiers, the MAG has not hesitated to pursue discipline of senior military officers, including a Brigadier General and a Colonel in one case, and a Lieutenant Colonel in another. In a third case, one officer was subject to disciplinary measures and two others to command sanctions, as described in more detail in Section III below. Furthermore, the IDF's six special command investigations, discussed in Israel's two previous reports, have focused on broader operational issues such as the use of weapons containing white phosphorous, the precautions taken in the vicinity of sensitive sites, and the destruction of private property. Some of these investigations have already led to substantial changes in IDF procedures, and other changes are in the process of being implemented.

A. Military Advocate General Review of Command Investigations

19. As described in the *January 2010 Update*, command investigations are important fact-finding inquiries intended not merely to examine the performance of IDF forces during military operations but also to identify and correct specific problems that may have occurred. Command investigations do not serve as a substitute for criminal investigations. Rather, command investigations compile an initial factual record, which is reviewed by the MAG together with the complaint and other relevant information before determining whether a criminal investigation is warranted. Command investigations may also recommend remedial measures, such as disciplinary actions or changes in operational procedures.
20. The MAG review of a command investigation is a rigorous procedure. During this review, the MAG considers the results of the command investigation together with the complaint received and all additional information provided by the complainant or publicly available, including reports published by human rights organizations and any additional sources of information at its disposal. The MAG also frequently asks follow-up questions of the investigators and may require them to

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perform additional fact-finding before making a decision on what course of action to take with respect to a particular complaint.

21. Even with regard to closed investigations, the MAG may reopen the review of an incident if new facts or circumstances subsequently come to light. This occurred, for instance, in the investigation of events around the el-Bader flour mill described in the *January 2010 Update*¹² (and discussed in Section III below), as well as in the investigation related to the al-Maqadmah mosque (also described in Section III).
22. Since January 2010, the Military Advocate General has completed his factual and legal review of numerous command investigations, referring some of them for criminal investigations, identifying others for disciplinary proceedings,¹³ and closing others when the investigation did not establish that IDF forces violated the Law of Armed Conflict or IDF procedures.

B. MPCID Criminal Investigations

23. Since the *January 2010 Update*, Israel has launched 11 new MPCID criminal investigations into IDF conduct during the Gaza Operation, bringing the total number of criminal investigations to 47. The latest criminal investigation ordered by the MAG relates to allegations described in several reports, including the *HRCFF Report*, pertaining to the Al-Samouni family.¹⁴
24. As explained in the *January 2010 Update*, command investigations are not a prerequisite for the initiation of a criminal investigation and therefore do not delay investigations in cases in which a *prima facie* basis for criminal behavior is clearly apparent. In fact, of the 47 criminal investigations initiated to date relating to the Gaza operation, 34—three quarters of the total—were directly referred to criminal investigations.
25. A number of criminal investigations have been concluded and their results reviewed by the MAG. In several of these cases, the MAG has referred the matter for disciplinary proceedings or ordered the issuance of a criminal indictment, as detailed in Section III below.
26. Since the conclusion of the Gaza Operation, the MPCID has focused its resources on the investigation of incidents arising out of the Operation. As previously reported, due to the volume and breadth of the investigations, a team of sixteen

¹² *Id.* ¶¶ 165-74.

¹³ As noted in the *January 2010 Update*, ¶ 55, disciplinary proceedings are reserved for less serious offenses. However, they can result in prison sentences of up to three years.

¹⁴ *HRCFF Report* ¶¶ 706-44. As stated in the *January 2010 Update*, ¶¶ 124-25, a special command investigation was established to review this incident. Upon review of the findings of the special command investigation, the MAG decided that a criminal investigation was warranted. This investigation will proceed concurrently with two criminal investigations which are underway regarding other aspects of the incident.

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investigators was dedicated exclusively to the Gaza Operation investigations. The investigators have at their disposal four Arabic-speaking translators. During a period when a particularly large volume of translations was required, the MPCID temporarily employed seven additional translators.

27. MPCID investigators traveled to various locations in order to meet with relevant witnesses, including Palestinians and IDF soldiers and officers involved in the Gaza Operation. In order to contact and coordinate meetings with Palestinian complainants in Gaza, MPCID investigators sought the assistance of human rights organizations and Israeli lawyers representing some of the complainants, which facilitated meetings between residents of Gaza and MPCID investigators (some in a facility at the Erez Crossing, one of the crossing points between Israel and the Gaza Strip). When the complainants named other potentially relevant witnesses in the course of an interview, investigators sought to interview those individuals as well.
28. In addition to collecting witness testimony, criminal investigators sought and obtained a variety of physical evidence, including IDF maps and operational logs relevant to the investigations. Investigators also gathered medical records from Gaza hospitals to assess injuries reported by Palestinian complainants. In some cases, MPCID enlisted the assistance of independent experts in order to study evidence of blast marks and attempt to identify the types of munitions used.
29. As noted in the *January 2010 Update*, MPCID investigators faced a number of difficult challenges in ascertaining the facts of rapidly evolving conflict situations.¹⁵ The first challenge was the identification of the IDF contingents operating in each area on the day in question. MPCID investigators met with representatives of the Southern Command and the Gaza Division and carefully mapped the movement of the forces in the course of the Operation. Investigators also took testimony from battalion commanders and company commanders. MPCID investigators then sought to match up particular allegations with the location of relevant forces.
30. Another challenge is that some Palestinian witnesses have refused to make any statement, even in writing, to IDF investigators. Other Palestinian witnesses have declined to provide testimony in person. While an affidavit can provide investigators with valuable information and serve as the starting point for an investigation, a written affidavit alone is generally inadmissible as evidence at trial. In the Israeli legal system, as in many others, proving a criminal case instead requires that witnesses be willing to appear in court to permit cross-examination on issues such as the witness's ability to observe the events, whether a witness has any bias, and whether there were other relevant facts not recounted in the written statement. Hence, in some cases, the unwillingness of a complainant to cooperate

¹⁵ *Id.* ¶ 93.

in criminal investigations may deprive the investigators of the most significant evidence.

31. Despite these difficulties, the MPCID has now completed a significant number of the criminal investigations opened in relation to the Gaza Operation. The MAG, in turn, has reviewed and made a decision with regard to many of these investigations. It should also be noted that in the course of evaluating some of the more complex incidents of the Gaza Operation, the MAG has consulted with senior attorneys in the Office of the State Attorney, and, in particular, with the Deputy State Attorney for Special Affairs and the Deputy State Attorney for Criminal Matters.
32. This Paper gives further detail about a number of MAG decisions reviewing criminal and command investigations in Section III.

C. Civilian Review of the Military Justice System

33. As detailed in the *January 2010 Update*,¹⁶ decisions of the MAG may be subject to civilian review by the Attorney General of the State of Israel, an independent figure of high authority. A complainant or NGO may trigger review of the Attorney General by sending a letter to the Attorney General requesting further review of the matter. The Israeli Supreme Court has ruled that the Attorney General can order the MAG to change his position concerning whether to file a criminal indictment.¹⁷
34. Decisions of both the MAG and the Attorney General may be subject to review by the Supreme Court, sitting as the High Court of Justice.¹⁸ This would include a decision whether to open a criminal investigation, whether to file an indictment, and whether to take other disciplinary action. Palestinian residents, as well as NGOs, have filed successful petitions challenging the MAG's exercise of prosecutorial discretion in several instances, while in other cases the Supreme Court has affirmed the decisions of the MAG.¹⁹

¹⁶ *Id.* ¶¶ 31-33.

¹⁷ *Id.*

¹⁸ *Id.* ¶¶ 34-40.

¹⁹ Examples of such petitions are detailed in the *January 2010 Update*, ¶¶ 36-37.

III. REPORT ON RESULTS OF SPECIFIC INVESTIGATIONS RELATING TO THE GAZA OPERATION

35. As stated in the *January 2010 Update*, Israel has launched more than 150 investigations into allegations of misconduct or violations of the Law of Armed Conflict related to the Gaza Operation, including the allegations described in the *HRCFF Report*. The *January 2010 Update* contained a description of four investigations with regard to which the MAG had completed his review as of the date of publication of that report. The present update reports on the results of several more of the cases reviewed by the MAG.

A. Investigations Relating to Alleged Mistreatment of Palestinian Civilians and Detainees

36. The IDF operational orders emphasize the duty to protect the dignity of civilians in the course of an armed conflict and to provide detainees with humane treatment. Accordingly, the standing orders of the Gaza Operation explicitly prohibited the use of civilians as human shields, as well as the compulsion of civilians to take part in military operations, in accordance with the Law of Armed Conflict and a Supreme Court ruling on the matter.²⁰
37. Israel takes seriously any and all reports of mistreatment of Palestinian civilians or detainees during the Gaza Operation. The MAG has directly referred for criminal investigation all allegations that civilians were used by IDF forces as human shields or compelled to take part in military operations or that detainees were mistreated while in IDF custody. As the cases described below illustrate, the facts uncovered by some of the investigations differ substantially from the allegations. Nonetheless, in one case described below, the MAG found sufficient evidence of wrongdoing to prosecute two soldiers, and, in another, the MAG referred the case for disciplinary proceedings against a senior IDF commander. Furthermore, as stated in the *January 2010 Update*, the principal issues concerning the conditions of detention of Palestinian detainees during the course of the Gaza Operation are the subject of an ongoing special command investigation, headed by a senior officer outside the chain of command during the events in question.²¹
38. The following are a number of examples of the results of the MAG's review of investigations relating to alleged mistreatment of Palestinian civilians and detainees.

²⁰ *Adalah—The Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF*, HCJ 3799/02 (6 October 2005).

²¹ See *January 2010 Update*, ¶ 125 & note 110, for the detailed mandate of this special command investigation.

(1) M.R.

39. The complaint regarding this incident was included in a Report of the Special Representative of the U.N. Secretary General for Children and Armed Conflict and alleged the use of a Palestinian boy as a human shield by IDF forces operating on 15 January 2010 in the Tel Al-Hawa area of Gaza City.²² A similar allegation was raised by an Israeli NGO. In light of the allegations, the MAG ordered the opening of a direct criminal investigation.
40. The MPCID sought to identify the complainant, whose identity was not referenced in the report of the Special Representative of the Secretary General for Children and Armed Conflict. The military police investigators contacted the Israeli NGO and requested its assistance in identifying the complainant and coordinating an interview with him. The boy was interviewed in the presence of his mother. The investigators also collected other evidence, including the testimonies of soldiers involved in the incident.
41. The investigation revealed that while conducting a search in a building in Tel Al-Hawa, two soldiers compelled a boy to open several bags and suitcases suspected of being rigged with explosives. Based on these findings, the MAG found substantial evidence that these soldiers had failed to comply with IDF orders prohibiting the use of civilians for military operations.
42. In March 2010 the MAG issued a criminal indictment against the two soldiers. The trial, which is open to the public,²³ is currently underway in a District Military Court in Israel. As of the date of this Report, the prosecution has presented its case, which included the testimony of the boy.

(2) Majdi Abd-Rabbo

43. A complaint by an Israeli NGO asserted that a Gaza resident named Majdi Abd-Rabbo was forced to assist an IDF unit in an attempt to obtain the peaceful surrender of several armed operatives hiding in a house adjacent to his own. The MAG referred the incident directly to an MPCID criminal investigation in June 2009.²⁴ With the assistance of the NGO, the MPCID met with the complainant and took his statement. In addition, testimony was taken from 15 soldiers and officers from the unit involved in the incident, as well as several soldiers and officers from other units operating in the area at the time specified in the complaint.

²² *Human Rights Situation in Palestine and Other Occupied Arab Territories*, A/HRC/10/22, at annex ¶ 10 (20 March 2009).

²³ *See January 2010 Update* ¶ 28.

²⁴ After the MPCID investigation was already underway, the allegations were also described in the *HRCFF Report*, ¶¶ 1033-63.

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44. Following a thorough investigation, various aspects of Mr. Abd-Rabbo's testimony could not be substantiated. However, the evidence gathered in the course of the investigation did reveal that the commander of the force, a Lieutenant Colonel who was in radio contact with the IDF unit throughout the event, had repeatedly authorized the unit to allow Mr. Abd-Rabbo to enter the structure adjoining his house in order to communicate with armed men inside.
45. Although the investigation found that Mr. Abd-Rabbo had asked to enter the structure and to communicate with the men, apparently in an attempt to resolve the situation and avoid potential damage to his own house, the MAG concluded that the commander should not have allowed Mr. Abd-Rabbo to enter the structure at that time, putting him at risk, regardless of his apparent consent.
46. Therefore, the MAG referred the case for disciplinary proceedings against the commander for failing to adhere to IDF operational orders prohibiting any such use of civilians for military operations. In opting for disciplinary proceedings rather than a criminal indictment, the MAG considered a range of factors, including the commander's belief that by consenting to Mr. Abd-Rabbo's request, he was acting to minimize potential damage to Mr. Abd-Rabbo's property. An additional factor was that Mr. Abd-Rabbo was not injured as a result of the incident. The officer was subsequently disciplined.

(3) Abbas Ahmad Ibrahim Halawa and Mahmoud Abd Rabbo al-Ajrami

47. Abbas Ahmad Ibrahim Halawa and Mahmoud Abd Rabbo al-Ajrami both alleged in two separate complaints that on 5 January 2009 Israeli soldiers took them from their homes in the Al-Atatra neighborhood, mistreated them, and forced them to act as human shields.²⁵ Mr. al-Ajrami also alleged that he suffered physical injuries as a result of mistreatment by IDF forces and that his house was vandalized and looted. The MPCID opened two separate criminal investigations into the two cases that were later combined when it became apparent that they related to a single chain of events.
48. In the course of the investigation, MPCID interviewed Mr. Halawa, Mr. al-Ajrami, and Mrs. Manal al-Ajrami. Investigators later sought to interview Mr. Halawa a second time, but he refused to appear. He did, however, provide investigators with additional information by means of a written affidavit. The MPCID also collected testimonies of over 20 officers and soldiers, including commanders of the regiments and companies that operated in the area during the relevant timeframe. In addition to witness testimony, the MPCID examined a variety of documentary evidence, including medical documents presented by Mr. al-Ajrami from Shifa hospital in Gaza.

²⁵ The allegations were also described in the *HRCFF Report*, ¶¶ 1064-95.

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49. The investigation found that an IDF unit operating in the Al-Atatra neighborhood and searching for weapons and terrorist operatives²⁶ encountered the families of Mr. Halawa and Mr. al-Ajrami, who chose to stay in their homes despite the early warnings issued by the IDF, calling for civilians to evacuate the neighborhood for their safety. The force suspected Mr. Halawa and Mr. al-Ajrami of involvement with militant groups, and thus detained them for questioning and transferred them out of the battle zone to an IDF post approximately one kilometer away. For security reasons, the detainees were blindfolded while they were being transferred to the post.
50. The consistent evidence was that at no time during the incident were either of the two individuals made to walk ahead of the soldiers or used as human shields. Rather, the two detainees walked surrounded by the soldiers as required by IDF operational procedures, both in order to protect the detainees as well as to reduce the possibility of their escape.
51. The investigation found no evidence to support the complainants' contention that they were physically abused while in IDF custody. In fact, this contention was contradicted by the records of Mr. al-Ajrami's medical examination at Shifa hospital soon after the incident. Similarly, the investigation determined that there were no grounds to attribute to IDF forces the vandalism or looting that may have occurred in Mr. al-Ajrami's home. The investigation noted that Mr. al-Ajrami told investigators that his family had failed to evacuate from the area partly due to their fear of burglaries and looting by other Gaza residents.
52. After reviewing the facts of the investigations, the MAG found that there were no grounds for any additional proceedings and closed both cases.

(4) AD/03

53. The *HRCFF Report* describes an incident involving an anonymous witness, AD/03, who alleged that he and others were improperly detained and coerced into assisting IDF forces during the Gaza Operation.²⁷ In reviewing these allegations and cross-referencing them with other available sources of information, Israeli investigators were able to establish the identity of AD/03 and determine that his case had already been reported to the IDF prior to the publishing of the report and was already the subject of a criminal investigation by the MPCID.²⁸

²⁶ The Al-Atatra neighborhood in which the incident occurred was an area of heavy fighting on the date in question. The neighborhood had been the site of multiple rocket launchings into Israel, prompting the IDF to take control of the area and search buildings for militants and weapons.

²⁷ *HRCFF Report* ¶¶ 1143-63.

²⁸ Acting through his Israeli lawyer, AD/03 sent a complaint regarding the incident to Israel's Attorney General. In accordance with Israeli procedure, this complaint was forwarded to the MAG, who ordered the opening of a direct criminal investigation.

54. At the outset of the criminal investigation, the MPCID contacted AD/03's lawyer to coordinate an interview with AD/03 at the Erez Crossing, where MPCID has taken testimony from dozens of Palestinian complainants in other cases related to the Gaza Operation, but AD/03 refused the requests. The lawyer asserted that AD/03 refused to be interviewed out of concern for his safety.
55. AD/03 continued to refuse to cooperate even though Israeli investigators explained that such testimony was essential to the criminal investigation. Taking detailed testimony from the complainant, including collection of any materials from the complainant that could be used to further the investigation, is a principal component of an MPCID investigation. The testimony is necessary not only to confirm allegations but also to identify the particular IDF unit and individuals that were allegedly involved. In the absence of a complainant's testimony, it is difficult for the military prosecution to build a sustainable criminal case, which requires proof of guilt beyond a reasonable doubt. Allegations contained in the *HRCFF Report* and various NGO and media reports would be considered inadmissible "hearsay" under the rules of evidence, and Israeli courts cannot rely on statements contained therein to prove criminal activity.
56. As of the date of this Paper, the case of AD/03 has been closed, but the IDF remains interested in interviewing him to learn more about the incident and complete the investigation. The IDF has given assurances that Palestinian witnesses who agree to come to the Erez Crossing point and provide testimony will be questioned by the MPCID only in relation to their complaints and will not be detained. These assurances are also applicable to AD/03.
57. It should be noted that some of the particular allegations cited in the complaint of AD/03, including the conditions of detention of Palestinians during the Gaza Operation, are the subject of a special command investigation described in the *January 2010 Update*.²⁹ That investigation is still ongoing.

B. Investigations Concerning the Alleged Targeting of Civilian Objects and Sensitive Sites

58. The principle of distinction is a core element of IDF standing orders. All IDF soldiers are instructed that strikes are to be directed only against legitimate military targets, combatants, and civilians directly participating in hostilities. IDF orders and doctrine strictly prohibit the intentional targeting of civilians or civilian objects. The principle of proportionality is also a core element, prohibiting attacks that are anticipated to harm civilians excessively in relation to the expected military advantage. IDF orders include the obligation to take all feasible precautions in order to minimize the incidental loss of civilian life or property,

²⁹ *January 2010 Update* ¶¶ 124-25; see also note 21, *supra*.

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such as by adjusting the timing of an attack, the means of attack, and the direction of attack, as well as aborting attacks under certain circumstances.

59. As described in the *Operation in Gaza Report*,³⁰ in conformity with the Law of Armed Conflict, IDF operational orders also instruct that medical facilities should be provided absolute protection from attacks, unless they are being used by the enemy for military activities. In addition, special precautions are to be taken when conducting military activities near U.N. premises and other facilities dedicated for humanitarian use, such as those of medical organizations and hospitals.
60. Following the Gaza Operation, the IDF reviewed complaints regarding the alleged targeting of civilian objects, as well as claims of damage caused to medical and U.N. facilities.³¹ These incidents were the subject of four special command investigations (one dedicated to damage to medical facilities, a second to U.N. facilities, a third dealing with incidents involving multiple civilian casualties and the most recent command investigation which is addressing several complex incidents).³² In two of these cases, five officers were disciplined or sanctioned, two of them for violating IDF rules of engagement and three others for failing to exercise appropriate judgment. In other cases, the MAG review revealed that the damage did not violate the principles of distinction and proportionality and has found no basis for imputing any criminal intent to the IDF soldiers in the field or to the principal actors in the operations.

(1) Al-Fakhura Street

61. The *HRCFF Report* describes an alleged Israeli mortar strike in al-Fakhura Street in Jabalia, in close proximity to a United Nations Relief and Works Agency (“UNRWA”) school used as a shelter, which reportedly caused a number of civilian casualties. This incident was discussed in the *Operation in Gaza Report*, which explained that Israeli forces fired on and eliminated a Hamas mortar squad that had fired repeatedly on them from a location approximately 80 meters from

³⁰ *Operation in Gaza Report* ¶ 224.

³¹ In the densely populated Gaza Strip there are over 750 U.N. facilities, and almost 1,900 sensitive facilities in total. Nonetheless, a relatively small number of complaints alleged damage caused to such sensitive facilities. The U.N. Board of Inquiry Report into certain incidents in the Gaza Strip found possible damage or injury by IDF action to seven U.N. facilities in the course of the Operation. Israel cooperated fully with the U.N. Board of Inquiry, sharing the results of its internal investigations and providing detailed information about the incidents in question. The Secretary General commended Israel for its extensive cooperation. Following the U.N. Board of Inquiry’s examination, and notwithstanding certain reservations it had with some aspects of the Board’s report, Israel entered into a dialogue with the United Nations to address all issues arising from the incidents examined. On 22 January 2010, the Secretary General again thanked Israel for its “cooperative approach” in these discussions and confirmed that all financial issues relating to these incidents had been satisfactorily concluded. U.N. Spokesperson Briefing (22 January 2010), available at <http://www.unmultimedia.org/radio/english/detail/89687.html>.

³² *January 2010 Update* ¶¶ 103-12, ¶¶ 124-27.

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the UNRWA school.³³ The MAG has now completed his review of the results of the special command investigation and found that IDF fire did not violate the Law of Armed Conflict.

62. The MAG found that the attack was directed against a legitimate military target and did not violate the principle of proportionality under the “reasonable military commander” test.³⁴ The MAG found that the Hamas mortar fire posed a clear and immediate threat to Israeli forces. In fact, the particular mortar rounds fired by Hamas over the course of an hour landed in very close proximity to Israeli forces. Only a day before, a mortar attack of a similar nature led to the wounding of 30 IDF soldiers.
63. The MAG also found that the commander was aware that the mortar attacks were being carried out from a populated area in the vicinity of an UNRWA school. For this reason, the commander took many precautions, including cross-verification of the source of fire by two independent means, using the most accurate weapon available, and making sure the school would not be hit by ensuring a safe buffer distance between the school and the targeted location. These precautions delayed the force’s response, prolonging its exposure to the Hamas mortar fire.
64. Ultimately, the MAG determined that the anticipated collateral damage prior to initiating IDF mortar fire was not excessive when weighed against the expected military benefit, in light of the clear military necessity of the force to protect itself from ongoing mortar fire, the force’s measured response, the relatively small area of dispersal, and the precautions taken.
65. The MAG also found that the IDF’s choice of weapons was appropriate under the circumstances. The Israeli forces employed a burst of four 120mm “Keshet” mortar rounds, fired in quick succession. The Keshet mortar contains advanced target acquisition and navigation systems and was the most precise weapon available to Israeli forces at that time. Air support was not available to the unit under attack at that moment, and the Law of Armed Conflict does not require commanders to await air support and prolong soldiers’ exposure to enemy fire.
66. Israel acknowledges that, while the strike was effective in removing the threat to Israeli forces, it also resulted in the regrettable loss of civilian lives. Although the MAG found that the IDF had not violated the Law of Armed Conflict with respect to this incident, as part of Israel’s efforts to minimize civilian casualties under all circumstances, the MAG reiterated the recommendation of the special command investigation to formulate more stringent definitions in military orders to govern the use of mortars in populated areas and in close proximity to sensitive facilities. The IDF Chief of General Staff has ordered the undertaking of staff work to draft the required orders.

³³ *Operation in Gaza Report* ¶¶ 336-40. The incident was described in the *HRCFF Report*, ¶¶ 653-90.

³⁴ *Operation in Gaza Report* ¶¶ 120-31.

(2) Al Maqadmah Mosque

67. The *HRCFF Report* and other sources alleged that on 3 January 2009 civilian casualties occurred inside the Al Maqadmah mosque in Beit Lahiya when an IDF missile struck the entrance to the mosque.³⁵ This incident was first examined in one of the original five special command investigations discussed in Israel's previous reports. This investigation could not substantiate that the mosque had been struck by IDF forces at the alleged time. However, in light of information included in other reports, the Chief of General Staff followed the MAG's recommendation that the case be reopened and reexamined in the context of a new special command investigation.
68. The new special command investigation confirmed that civilian casualties and damage to the mosque which occurred on 3 January 2009 were indeed a result of an IDF missile strike directed at two terrorist operatives standing near the entrance to the mosque.
69. These operatives, who belonged to a terrorist squad that was involved in the launching of rockets towards Israel, were initially identified standing in the vicinity of a hospital —and they were therefore not targeted at that time. The operatives were later identified at a different location in Beit Lahiya. At this point, the IDF began to deploy its assets for an immediate attack against the two terrorist operatives.
70. In the course of the preparations for the attack, the area of the strike was monitored closely and observed for several minutes. During this time, no civilians were visible in the surrounding streets, except for one who entered the building adjacent to the operatives. Since the location appeared to be clear of civilians, the strike against the operatives was initiated. The missile was directed at the operatives and struck the ground near the entrance to the building.
71. The investigation revealed that the military commanders planning the strike were not aware that the building next to the operatives was a mosque. The building did not have a minaret that might have identified it as a mosque and it was not marked as such on the operational maps used by the commanders. The commanders were also unaware that one of the entry doors to the building was open, since this could not be discerned from the observation. The investigation disclosed that, as a result of the open door, shrapnel from the missile flew into the mosque, resulting in a large number of casualties inside the mosque.
72. Based on these findings, the investigation concluded that the commanders who authorized the attack were not aware that the building adjacent to the target was a mosque and did not anticipate that there would be any civilian casualties as a result of the strike.

³⁵ The incident was also described in the *HRCFF Report*, ¶¶ 822-43.

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73. Nevertheless, the investigation found that an IDF Captain involved in the preparations for the strike had learned, just before the strike, but after it had already been approved, that the building might be a mosque. The officer gravely erred in exercising his judgment in failing to bring this information to the attention of his superior commanders so that they could reconsider the strike. In light of this finding, the officer was disciplined by means of a severe reprimand, taking into account the fact that he had not anticipated harm to civilians and given the time-sensitivity of the attack, which required quick action under extreme pressure. In addition, it was decided that the officer would not be allowed to serve in positions of a similar nature and responsibility in the future.
74. The command investigation also determined that two officers responsible for the selection of ammunition used in the air strike had also exercised poor professional judgment and deviated from professional guidelines when they used a more powerful missile than they had been directed to use. This was done because the requested missile was not available on short notice and the operation was highly time-sensitive. As the officers did not anticipate any civilian casualties from the strike, they did not foresee any additional risk to civilians resulting from using the selected missile. The officers were both sanctioned and temporarily suspended from taking part in operational activity.
75. After reviewing these findings, the MAG concluded that the strike did not target either civilians or civilian objects, since it was aimed at the terrorist operatives. As such, it abided by the principle of distinction.
76. The MAG also concluded that the strike did not violate the principle of proportionality because the decision makers in the operation did not expect harm to civilians, based on their observation of the area several minutes before the strike, and the information they possessed regarding the nature of the building. They also did not know and could not discern that the door to the building was open. In light of this, the anticipated incidental harm to civilians was low and the expected military advantage of the strike—targeting terrorist operatives involved in the launching of rockets towards Israel—was high.³⁶ The MAG further concluded that the negligence of some of the officers involved in the attack did not alter the good faith of the senior commanders in seeking to abide by the key norms of distinction and proportionality.
77. The MAG also determined that the disciplinary measures taken against the negligent captain, as well as the command sanctions against the officers in charge of munitions, were sufficient under the circumstances. The officers had not expected harm to civilians based on their observation of the area and were operating under extreme pressure due to the time-sensitivity of the strike.

³⁶ On that day alone, 39 rocket and mortar shells were launched from Gaza towards Israeli towns.

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78. Even though no criminal proceedings were initiated in this case, the MAG has recommended a revision of IDF procedures and its implementation through additional training to ensure that the errors that led to this result will not be repeated.

(3) Hamas “Police” Stations in al-Sajaiyeh and Deir al-Balah

79. The legality of targeting Hamas’s “police” force was extensively discussed in the *Operation in Gaza Report*.³⁷ As detailed in that report, Hamas military forces in Gaza were comprised not only of the Izz al-Din al-Qassam Brigades (Hamas’s official military wing), but also included the internal security apparatus of Hamas in Gaza, which performed, in addition to their regular law enforcement tasks, significant military functions. One such force—and the most substantial in size—was the police force.
80. Extensive information gathered by the IDF prior to the Operation substantiated the military function of the police force in Gaza based on its military, operational, logistic and administrative ties and cooperation with the military wing of Hamas, both as a matter of routine and particularly during a state of emergency, for instance during an Israeli military operation inside the Gaza Strip.³⁸ This military function rendered the police force a legitimate military target.
81. Additional information gathered by the IDF both in the course of the Operation³⁹ and following its completion—including public statements made by Hamas officials—further confirmed that the police force in Gaza was intertwined with the military wing of Hamas. In fact, even the current minister of the Interior and National Security of the Hamas regime in Gaza—responsible for the internal security forces of Hamas, including the police—in listing the “achievements” of his predecessor, Sayid Siyyam, said that:

“among the minister’s greatest achievements was the creation of the cooperation and coordination between the current security services and the Palestinian resistance...against the Zionist enemy...and for that reason [the enemy] attacked the headquarters of the security services [during the Gaza Operation]”.

³⁷ *Operation in Gaza Report* ¶¶ 77-81, 237-48.

³⁸ Routine military activities by the Palestinian police in Gaza included: the gathering of intelligence about IDF activities, including surveillance; the provision of weapons to assist in the capabilities-building of Hamas’s military wing; and participation in a variety of military training exercises. In a state of emergency, the police force was institutionally planned to be involved in fighting Israeli forces. The police have been observed performing this function during past operations of the IDF in the Gaza Strip.

³⁹ According to information gathered by the IDF, just before the beginning of the Gaza Operation, the internal security forces in Gaza prepared for re-deployment in anticipation of the fighting with the IDF. In the course of the operation, the internal security forces shared “operations rooms” with the military wing, cooperated with the intelligence units of the military wing, and gave preference to their military functions over law enforcement tasks.

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(Hamas police website, May 7, 2009)⁴⁰

82. The MAG has recently completed his review of the findings of command investigations into two aerial strikes on police stations reported in the *HRCFF Report*—one in al-Sajaiyeh and the other in Deir al-Balah—which allegedly resulted in civilian casualties.⁴¹ These strikes were part of the Israel Air Force (“IAF”) aerial campaign at the commencement of the Gaza Operation, aimed at weakening Hamas’s terrorist and military strongholds and capacity by targeting its operational infrastructure. The MAG concluded that the strikes were mounted against legitimate military targets and thus complied with the principle of distinction.
83. The police station in Deir al-Balah was part of the “internal security” apparatus of Hamas, and was occupied by armed operatives. It was struck on the first day of the aerial campaign, as part of a coordinated IAF opening strike, intended to substantially weaken the military force available to Hamas during the Operation by concurrently attacking numerous military locations.
84. It was alleged that, as a result of the strike on the Deir al-Balah station, six civilians were killed, five of them while attending a nearby vegetable market. The investigation found that the IAF was not aware of the existence of the vegetable market, as the market’s location had not been reported to the IDF in the past and thus was not marked as a “sensitive site” on IAF maps, which could have affected the planning of the air strike. In addition, it was not observed as a gathering place of civilians in aerial photographs analyzed by the strike’s planners before the operation.
85. The IAF took several measures in order to minimize collateral damage, including the use of munitions with a warhead of reduced size and strength, equipped with a delay fuse.⁴² Advanced warnings could not be given due to the timing of the strike, which required the element of surprise.
86. The al-Sajaiyeh police station served as the central station of the police force in that area, and was also occupied by armed Hamas operatives. It was attacked on the second day of the aerial campaign, intended to further destroy Hamas’s operational and command infrastructures. Similar precautions to the ones implemented in the strike against the station in Deir al-Balah were used in this strike as well. Nevertheless, as a result of the attack, four civilians were reportedly killed in an adjacent street.

⁴⁰ Intelligence and Terrorism Information Center, *Hamas and the Terrorist Threat from the Gaza Strip: The Main Findings of the Goldstone Report Versus the Factual Findings*, at pp. 271 (March 2010), available at http://www.terrorism-info.org.il/malam_multimedia/English/eng_n/pdf/g_report_e1.pdf.

⁴¹ *HRCFF Report* ¶¶ 405-07.

⁴² Unlike a regular warhead, which will normally detonate upon impact with an object, a warhead with a delayed fuse will detonate within a structure, and thus will typically cause a more contained explosion with less debris and shrapnel.

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87. The MAG reviewed the findings of the command investigations and concluded that both strikes were planned and executed in accordance with the Law of Armed Conflict. The MAG noted that, despite the unfortunate death of civilians, in both cases the anticipated collateral damage to civilians was not excessive in relation to the expected military advantage of the strike, due to the strategic importance of the strikes conducted on the first days of the Operation against Hamas's operational and command infrastructures and their substantial contribution to the ability of the IDF to achieve the goals of the Operation as a whole. Accordingly, the MAG decided not to refer either of the cases for additional proceedings.
88. Nonetheless, the findings of the command investigations will be studied as part of the operational "lessons learned" analysis, in order to consider measures which can minimize the danger to civilians in future military actions. In this regard, the MAG has recommended improvements regarding the mapping of "sensitive sites." Currently, these sites are identified by the IDF based on information received from various sources regarding certain types of facilities, such as: hospitals, schools, mosques, and U.N. facilities. In light of the findings of the investigation of the Deir al-Balah station strike, the MAG recommended the broadening of this list to include places of large civilian gatherings, such as open markets.

(4) Hamas Security Force Building adjacent to the Main Prison

89. The IDF investigated allegations that on 28 December 2008 the main prison complex inside the al-Saraya compound in Gaza City was deliberately targeted in an air strike.⁴³
90. The command investigation of this incident confirmed that an IAF aerial attack on 28 December caused damage to prison facilities within the al-Saraya compound. However, the damage occurred because the prison was located immediately adjacent to the barracks building used by Hamas internal security forces. The barracks—which were the object of this strike—were a legitimate military target.⁴⁴ Incidental damage occurred to several smaller structures within the prison complex and led to the collapse of several prison walls. The central structure of the prison remained standing. The damage also led to the death of one prison guard and injury to several other guards. No prisoners were injured in the attack.
91. Upon review, the MAG found that the attack did not violate the Law of Armed Conflict. The IDF attack targeted a specific military facility, taking precautionary measures, including the use of precision technology. Under these circumstances, the MAG determined not to pursue any further proceedings.

⁴³ HRCFF Report ¶¶ 365-70.

⁴⁴ See ¶¶ 79-81, *supra*, and accompanying notes.

(5) UNRWA Field Office Compound

92. One of the most widely reported incidents during the Gaza Operation involved the UNRWA field office compound, where three individuals were injured and significant property damage resulted from the use of smoke-screen munitions containing white phosphorous. Additional damage occurred due to the use of high explosive shells in the vicinity of the compound.⁴⁵
93. A special command investigation, devoted to examining claims of damage to U.N. facilities by IDF forces, included an investigation of the UNRWA incident, and factual findings of that investigation were reported in the *Operation in Gaza Report*.
94. With regard to the use of high explosive shells in the incident, based on the findings of the investigation, the Commander of the Southern Command disciplined two senior commanders, a Brigadier General and a Colonel, for authorizing the use of the shells in violation of the safety distances required in urban areas set forth in IDF operational orders. The MAG reviewed the results of the investigation and concurred with the decision to discipline the two officers. He also determined that, even though the shelling was carried out in violation of IDF operational orders, no criminal charges were appropriate because the shelling was aimed at military targets, and because precautions were taken which proved effective in avoiding civilian casualties.
95. With regard to the use of the smoke-screening munitions, the MAG found that the investigation did not demonstrate any violations of the Law of Armed Conflict or IDF procedures. As explained in the *Operation in Gaza Report*, this type of munition is not prohibited under international law, even in urban areas.⁴⁶ In the particular circumstances of this case, the MAG determined that the use of these munitions was needed to protect Israeli forces from Hamas operatives armed with anti-tank missiles⁴⁷ and complied with the requirement of proportionality, as the anticipated risk to civilians and civilian objects stemming from their use was not excessive in relation to the expected military advantage.
96. The investigation did find that the actual damage to the compound as a result of the smoke-screening shells was more extensive than the IDF had anticipated. Following reports of the damage, the IDF immediately imposed revised restrictions on the use of smoke-screening munitions containing white phosphorous near sensitive sites (including the requirement of a several hundred meters buffer zone). These restrictions were in place through the remainder of the Gaza Operation.

⁴⁵ This incident was also described in the *HRCFF Report*, ¶¶ 543-98.

⁴⁶ *Operation in Gaza Report* ¶¶ 405-30.

⁴⁷ *Id.* ¶¶ 341-47.

97. The use of smoke-screening munitions containing phosphorus during the Gaza Operation was also addressed in a special command investigation dedicated to the issue. This investigation determined that the policy of using such munitions was consistent with Israel's obligations under the Law of Armed Conflict. Nonetheless, following that investigation, the Chief of the General Staff ordered the implementation of the lessons learned from the investigation, particularly with regard to the use of such munitions near populated areas and sensitive installations. As a consequence, the IDF is in the process of establishing permanent restrictions on the use of munitions containing white phosphorus in urban areas.

C. Investigations Concerning the Alleged Targeting of Civilians

98. As mentioned above and also detailed in the *Operation of Gaza Report*,⁴⁸ IDF standing orders incorporate the principle of distinction and prohibit the intentional targeting of civilians. This section discusses the results of several investigations of incidents in which IDF military operations resulted in the death of civilians, allegedly in violation of the Law of Armed Conflict and the IDF standing orders. In one of the cases, an indictment has been filed against a soldier suspected of killing a civilian. Other cases have not uncovered evidence justifying disciplinary proceedings or a criminal indictment but nevertheless resulted in lessons learned and operational adjustments by the IDF intended to further minimize the possibility of similar events happening in the future.

(1) Juhr ad-Dik Incident

99. Following information received by the MAG, a criminal investigation was opened into an incident involving a soldier who opened fire, killing a civilian who was walking with a group of civilians carrying white flags in the village of Juhr ad-Dik on 4 January 2009.
100. According to the investigation, the soldier discharged his firearm in a manner inconsistent with orders given to him by his superior officer.
101. In light of the time and place of the incident, investigators believed that the case corresponded to allegations regarding the deaths of Majda and Rayya Hajaj described in the *HRCFF Report*.⁴⁹ There were, however, a number of inconsistencies between the two accounts, which prevented the investigators from making a positive identification of the civilian killed.
102. Nonetheless, since the evidence gathered in the course of the investigation implicated the soldier in a shooting incident of a civilian in deviation from orders,

⁴⁸ *Id.* ¶¶ 222--23.

⁴⁹ *HRCFF Report* ¶¶ 764-69.

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the MAG has ordered the indictment of the soldier on the charge of manslaughter for the killing of a civilian during the Gaza Operation.

(2) Rouhiya al-Najjar

103. This incident—involving the death of Rouhiya al-Najjar on 13 January 2009 in the village of Khuza’a—was reported to the Israeli authorities by several human rights organizations.⁵⁰ After examining the results of a command investigation regarding this incident, together with the complaints that had been received, the MAG determined that the facts available led to a significant suspicion of criminal behavior, and referred the case for an MPCID criminal investigation. The MPCID investigation included interviews with eight Palestinian residents of Gaza, including members of the al-Najjar family. Investigators also questioned more than fifteen IDF soldiers and officers regarding the incident, and studied aerial and ground photographs.
104. The investigation found that the IDF unit operating in the Khuza’a area on 12 January 2009 was involved in active combat with terrorist operatives. The operatives launched a rocket-propelled grenade (“RPG”) missile towards the building occupied by the IDF unit in the early morning hours of 13 January.
105. Later that morning, the soldiers were still carefully monitoring the area adjacent to the building in order to prevent additional rocket attacks. The soldiers observed suspicious activity in the street leading to the building: a woman was identified repeatedly approaching the building carrying an unidentified package, which she placed near the building. Immediately after she returned and entered a house down the street, a group of local women unexpectedly began approaching the IDF position, and the soldiers suspected a tactic that could conceal a gunman or suicide bomber. One of the soldiers fired a warning shot to prevent the group from advancing further. A ricochet from this warning shot apparently struck Rouhiya al-Najjar, killing her.
106. The MAG reviewed the testimony collected in the course of the investigation and concluded that, under the circumstances, the soldier who fired the shot was not criminally liable. The MAG concluded that the soldier fired his weapon in light of the security need to keep the group from approaching the IDF post and his shot was not intentionally directed to hit or harm civilians. Thus, while acknowledging the lamentable results of the incident, the MAG closed the case without filing a criminal indictment against the soldier.
107. However, the MAG did find that a lapse in effective communication between IDF units may have played a part in the soldier’s perception of the group as a threat. This led the MAG to recommend certain changes to IDF operational procedures, which could assist in improving the manner in which evacuation instructions are

⁵⁰ The incident was also described in the *HRCFF Report*, ¶¶ 780-87.

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given to the civilian population by the IDF, as well as to the method for relaying such information among the different forces in the field.

(3) Amal, Souad, Samar, and Hajja Souad Abd Rabbo & Adham Kamiz Nasir

108. This incident involved the alleged shooting of four Palestinian civilians on 7 January 2009 in the neighborhood of Izbat Abd Rabbo, and was reported to Israeli authorities by several human rights organizations.⁵¹ The MAG referred the complaint to a direct criminal investigation which was recently concluded. In the course of this comprehensive investigation, the MPCID collected testimony from eleven Palestinians who witnessed the events. Some of them were unable or unwilling to testify before MPCID investigators, but provided detailed affidavits. In addition, the investigators reviewed medical reports and death certificates, as well as aerial photographs provided by an Israeli NGO, which helped identify the different units involved in the incident. More than fifty commanders and soldiers from these units were also questioned by the MPCID. Some were questioned multiple times in order to clarify the circumstances of the case.
109. The evidence collected in the course of the investigation could not confirm the description of the incident by the complainants, who claimed that a soldier standing on a tank had opened fire at a group of civilians. The substantial discrepancies between the complaint and the findings of the investigation—in particular, the identity of the force and the sequence of events—led the MAG to conclude that the evidence was insufficient to initiate criminal proceedings.
110. A second part of the complaint alleged that the IDF fired at a horse-driven carriage attempting to evacuate the civilians injured in the first shooting incident and subsequently killed the carriage's driver.
111. The investigation confirmed that the carriage was fired upon by an IDF unit operating in the Izbat Abd Rabbo neighborhood. The unit had received a concrete warning that Hamas planned to send such a carriage loaded with explosives to detonate near an IDF position. The soldiers fired warning shots at the approaching carriage, which was loaded with bags that the soldiers thought contained explosives. When the carriage did not respond to the warning shots and continued its approach, the unit fired in its direction.
112. Under these circumstances, the MAG determined that the soldiers who fired at the carriage were not criminally liable. The MAG found that the soldiers' decision to fire was made in light of their belief, at the time, that the carriage posed an immediate threat to the force. (The investigation revealed that the bags did not contain explosives.) Thus, despite the unfortunate results of the incident, the MAG decided to close the case.

⁵¹ The incident was also partially described in the *HRCFF Report*, ¶¶ 770-79.

(4) Abd al-Dayem

113. This incident, involving an alleged attack on the Abd al-Dayem condolence tents in Beit Hanoun on 5 January 2009 using flechette munitions, and resulting in the deaths of civilians, was reported to Israeli authorities by several human rights organizations.⁵² After examining the results of a command investigation regarding this incident together with the complaints that had been received, the MAG referred the case for an MPCID criminal investigation, which was recently concluded.
114. In the course of this investigation, the MPCID collected testimony from eighteen Palestinian witnesses and a number of soldiers from the relevant force. Investigators also obtained and considered physical evidence such as medical reports and photographs received from an Israeli NGO. Two technical experts were consulted regarding the munitions used in this incident and their effects. Investigators also reviewed technical manuals regarding the operation of the munition.
115. The investigation revealed that a tank crew operating in Beit Hanoun had visually identified a squad of terrorist operatives in open terrain, loading a “Grad” rocket⁵³ onto a launcher. (Many such rockets were launched towards Israel before and during the Operation.) During the Gaza Operation, this was an area frequently used by terrorist operatives to launch rockets towards Israel. The tank commander immediately began preparing a strike to prevent the imminent terrorist attack on Israeli civilians.⁵⁴ Since the operatives were at a distance of approximately 1,500 meters away from the force, the use of machine guns would be ineffective. The tank commander therefore decided to use flechette shells, based on an assessment that they would be the most effective in open terrain. The tank crew observed the area surrounding the terrorist squad and did not identify any civilians in the vicinity. Hence two successive flechette shells were fired at the operatives, killing them.
116. The investigation found that, although the shells were aimed at and hit the terrorist squad in open terrain, darts from the flechette shells could have incidentally struck civilians near the Al Dayem condolence tent. However, the investigation confirmed that the soldiers did not identify any civilians in the vicinity of the terrorist squad, and therefore did not foresee the harm to the civilians near the tent.
117. The MAG reviewed the findings of the investigations and determined that the actions of the tank crew did not violate the Law of Armed Conflict. The flechette shells were launched against a military target in order to prevent an imminent

⁵² The incident was also described in the *HRCFF Report*, ¶¶ 867-85.

⁵³ A “Grad” is a 122mm foreign manufactured artillery rocket with a range of 20 kilometers.

⁵⁴ Thirty-two rocket and mortar shells were fired at Israel in the course of that day.

threat to Israeli civilians. The force did so in the reasonable belief that no civilians were present in the immediate vicinity of the terrorist squad. The use of these munitions is not prohibited under international law, as confirmed by Israel's Supreme Court and discussed in the *Operation in Gaza Report*.⁵⁵ The force acted in accordance with the applicable rules of engagement, which allowed the use of flechette shells against military targets located in open terrain. Therefore, despite the tragic consequences of the incident, the MAG determined that no further proceedings were required.

D. Investigations Concerning Damage to Private Property

118. As described in the *Operation in Gaza Report*, IDF's operational orders for the Gaza Operation mandated that private property must be respected. In accordance with the Law of Armed Conflict, the destruction of civilian property was prohibited, except in cases of imperative military necessity which required that the damage be proportional to the military advantage. The destruction of property for deterrence or retribution was strictly forbidden.⁵⁶
119. Immediately after the cessation of hostilities, Israel launched a special command investigation into the manner in which the IDF carried out this mandate during the conflict.⁵⁷ In addition, the IDF has conducted specific command investigations to examine particular incidents of destruction of property. The MAG has carefully reviewed the results of the investigations completed so far.
120. The following are three specific cases of significant property damage discussed in the *HRCFF Report* in which the MAG has completed his review of the facts and issued a final opinion. In addition, a further investigation of the el-Bader flour mill case (described in the *January 2010 Update*) is presented below.
121. These incidents highlight the difficulties posed by terrorist groups that operate within densely populated civilian areas and near economic facilities. During the Gaza Operation, Israeli forces made extensive efforts to avoid civilian casualties and unnecessary damage to civilian property. Even so, fighting an adversary that deliberately made use of civilian buildings to store ammunition, mount attacks, and conceal combatants—as well as booby-trapping civilian buildings with explosives along the expected path of advancing forces—created enormous operational dilemmas. Israel has acknowledged that significant damage was caused to civilian property as a result of the events of the Gaza Operation. As described in more detail in Section IV, Israel is adapting and revising its military procedures to further minimize damage to civilian property in the future.

⁵⁵ *Physicians for Human Rights v. OC Central Command*, HCJ 8990/02 (27 April 2003); *Operation in Gaza Report* ¶¶ 431-35.

⁵⁶ *Operation in Gaza Report* ¶ 226.

⁵⁷ *Id.* ¶¶ 318, 436-45; *January 2010 Update* ¶¶ 113-16.

(1) The Sawafeary Chicken Coops

122. According to allegations included in the *HRCFF Report*,⁵⁸ in January 2009 IDF forces bulldozed several chicken coops owned by the Sawafeary family in Zeytoun, purportedly as part of a deliberate strategy of destroying civilian infrastructure.
123. The command investigations conducted with regard to this incident reveal that the Sawafeary chicken coops were destroyed for reasons of military necessity.
124. Specifically, the investigations revealed that the area around the Sawafeary chicken coops was occupied by an IDF ground force beginning on 4 January 2009, as part of the ground maneuver, with the intention to take control of rockets and mortar launching sites and reducing the number of terror attacks on Israeli territory. The force took positions in several houses, including one house that was adjacent to the chicken coops. This positioning was necessary to secure the area for military operations against Hamas and to protect the IDF troops in those operations. The IDF's defense plan for this area needed to meet three serious threats to the safety and security of the IDF troops: the firing of anti-tank and RPG missiles on IDF positions; sniper fire; and infiltration of terrorist operatives into the immediate vicinity of the forces in order to plant and detonate explosive devices, including by suicide bombers.
125. The terrain in the area made this location more dangerous for IDF forces. The area was agricultural in its original use and thus included many orchards, groves, and greenhouses, located between and around the houses occupied by the IDF. This made it harder for the IDF to identify Hamas positions and fighters. The threat was not theoretical—on 5 January 2009, an RPG missile was launched at one of the IDF positions in that area. In addition, several shooting incidents occurred originating from the orchards located to the south of the chicken coops.
126. In order to overcome these threats, the IDF decided to create a security zone around each of the IDF positions with a perimeter of 20–50 meters around each post, which would allow uninterrupted observation and firing capabilities for the force in each position, as well as joint protection among the different IDF outposts. These security zones allowed IDF forces to anticipate at an earlier stage the approach of terrorist operatives.
127. The Sawafeary chicken coops were located only a few meters away from one of the key IDF positions. The IDF position was, itself, dictated by the lay of the terrain in the area. As the command investigation determined, this IDF position could not be adequately secured if the chicken coop structures were left intact. The demolition of these structures was needed to allow a clean line of sight for protection of IDF forces. The investigation also determined that the decision to

⁵⁸ *HRCFF Report* ¶¶ 942-61.

destroy the coops was consistent with the demands of the principle of proportionality: there was a compelling military need for the area to be cleared for the safety of the IDF forces and for the success of IDF operations against the Hamas forces operating in the area. The local commanders determined that these advantages outweighed the damage to private property that would result from the demolition. The commanders avoided the destruction of residential buildings or other facilities in the area, when such destruction was not required by military necessity or appeared to be disproportional.

128. The MAG reviewed the findings of the command investigation and concluded that the destruction of the chicken coops was lawful, as it was necessary to protect IDF forces operating in the area. It did not violate the limitation on destruction of private property because it was justified by military necessity. The MAG also found that the destruction of the chicken coops did not violate the ban on destroying any object that is indispensable to the survival of the civilian population. It was dictated by the location of specific operations against Hamas, and not part of a campaign to interfere with the production of food supplies in Gaza. It was not intended to deny the civilian population in Gaza access to essential commodities.⁵⁹ As a result of these findings, the MAG determined that no further proceedings were necessary.
129. Although the MAG found no violation of the Law of Armed Conflict in this incident, he recommended several changes to IDF procedures in cases involving destruction of private property, which are detailed below in Section IV of this Paper. In particular, the MAG found that the decision to destroy the chicken coops was made by a relatively junior IDF officer, and that such decisions were more appropriately and typically made at more senior levels. While the MAG found that the particular rank of the officer making the decision did not indicate wrongful or criminal conduct (as neither the Law of Armed Conflict nor IDF procedures at the time required that such decisions be taken by an officer of any particular rank), he has recommended that the IDF's procedures for destruction of civilian property be reviewed in several respects, as detailed in Section IV below.

(2) The Abu Jubbah Cement-Packaging Plant

130. According to allegations included in the *HRCFF Report*,⁶⁰ in January 2009, the IDF wrongfully destroyed a cement-packaging plant owned by Mr. Atta Abu Jubbah, utilizing both aerial and ground attacks. This was allegedly part of a deliberate strategy of gratuitous destruction of civilian infrastructure in Gaza.

⁵⁹ In particular, during the course of 2009, over 230 truckloads of fertilized chicken eggs (intended to hatch) were transported by Israel to the Gaza Strip, in addition to immunizations and food for chickens. More than 130 more trucks carrying fertilized chicken eggs have been transported to Gaza since the beginning of 2010.

⁶⁰ *HRCFF Report* ¶¶ 1012-17.

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131. The incident was investigated by both IDF ground forces and the IAF.⁶¹ These investigations concluded that the cement plant was not the target of any aerial attacks, nor was artillery fire directed at it. Instead, it was damaged in the course of intense fighting that took place in the immediate area of the plant, including IDF efforts to locate and destroy an intricate tunnel system that was dug by Hamas. These tunnels were intended both to strengthen Hamas's operating capabilities and to help it execute plans to attack or capture IDF soldiers.
132. The investigation also concluded that the IDF soldiers believed that the plant was being used by Hamas operatives to position themselves to attack and kidnap Israeli soldiers.
133. While artillery shells were neither directed at the plant nor landed inside it, operations in that area did involve IDF artillery fire at military targets near the factory, and the shrapnel from these shells may have caused structural damage to the plant. In addition, IDF tanks and bulldozers entered the plant while searching for tunnel infrastructure, causing damage to some of the pillars holding the factory's roof. As a result, the factory roof partially collapsed.⁶²
134. The MAG reviewed the results of the command investigations and determined that the damage caused to the cement-packaging plant was incidental to the combat activities in the area and proportionate to the military need under the circumstances. As a result of these findings, the MAG determined that no further proceedings were necessary.

(3) The Al-Wadiyah Group's Factories

135. According to allegations made in the *HRCFF Report*,⁶³ the IDF gratuitously destroyed factories belonging to the al-Wadiyah Group which were engaged in the manufacture of a variety of snacks. The *HRCFF Report* cites the incident as evidence of a deliberate strategy to deprive the population of essential commodities.
136. This allegation was also investigated by the IDF. As the command investigation found, the factories were in the area of Izbet Adb Rabbo, where Hamas had concentrated significant military resources. The IDF forces encountered a constant

⁶¹ This kind of parallel investigation would take place whenever concerns regarding the activities of various branches of the military are raised in an investigation. A similar dual-track investigation took place in the case of the investigation of damages at the Al-Bader flour plant, discussed in detail in the *January 2010 Update*, ¶¶ 163-74.

⁶² Contrary to some reports, the IDF investigation revealed that the damage to the factory was limited. For instance, while several reports alleged that the IDF destroyed a silo used to contain large amounts of cement, IDF aerial photos indicate that it was still standing at the end of the Operation. While this does not rule out the possibility that damage was caused to the structure, it does support the finding that the plant was not targeted intentionally and that the damage caused to the plant was incidental.

⁶³ *HRCFF Report* ¶¶ 1018-20.

barrage of hostile fire from the area, reflecting Hamas's control of the surrounding neighborhoods. The area is also close to the Gaza border with Israel and has served as a base for terrorist attacks directly against Israel. The area was therefore a focus of IDF operations.

137. As the command investigation concluded, IDF forces fighting in the area near the factories discovered a well-prepared military infrastructure, including an extensive network of underground tunnels used by Hamas operatives to fight the IDF forces. The military infrastructure in that area also included booby traps and improvised explosive devices ("IEDs") planted under the main roads and in civilian buildings, as well as in the civilian buildings used by Hamas as its military posts.
138. An IDF unit encountered military operatives leaving one of the al-Wadiya factories. In response to the attack, and in light of the concern about the use of the factories and the tunnels in their vicinity as a continuing threat to IDF forces in the immediate area, the IDF force decided to demolish the buildings. The investigation found that the IDF forces did not know the structures were used to produce food products.
139. The MAG reviewed the findings of the command investigations and concluded that the demolition of the buildings was lawful, as it was necessary to protect IDF forces operating in the area. The MAG found that it did not violate the rules on protection of private property since it was justified by military necessity.⁶⁴ The MAG also found that the destruction of the factories was not intended to deny the civilian population in Gaza commodities indispensable to its survival. The purpose of the demolition was instead to protect IDF forces operating in the area and not to prevent the civilian population from having access to essential commodities (regardless of whether the products made in the factories qualify as essential). Based on these findings, the MAG determined that no further proceedings were necessary.
140. Although the MAG found no violation of the Law of Armed Conflict in this incident, he recommended several changes to IDF procedures in cases involving destruction of private property, as detailed below in Section IV.

(4) The El-Bader Flour Mill

141. The case of the el-Bader flour mill was discussed in the *January 2010 Update*. It concerns allegations that the mill had been targeted with precision weapons in the course of a pre-planned air strike, as part of a systemic destruction of industrial infrastructure and with the purpose of depriving the civilian population of Gaza of food supplies. The IDF investigation into the matter concluded instead that the mill was been struck by a tank shell in the course of active combat activities, in order to neutralize immediate threats to IDF forces.

⁶⁴ See *Operation in Gaza Report* ¶ 436.

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142. Following the publication of the *January 2010 Update*, various news media stated in February 2010 that the U.N. was in possession of evidence that contradicted the findings of the IDF investigation. Specifically, it was reported that an unexploded IAF bomb was found in the mill, even though the command investigation had concluded there had been no aerial strike.⁶⁵
143. Upon reviewing these reports, the MAG requested and received additional evidence from the U.N. and ordered the IAF to re-open its investigation of the incident. The MAG also initiated a meeting with U.N. representatives, who had visited the site of the mill, to discuss their findings. The follow-up investigation confirmed the earlier finding that the mill had not been targeted by the IAF in the course of a pre-planned attack. The new reports, photographs taken by U.N. officials, and video footage examined appeared inconsistent with an airborne strike, particularly given the absence of entry holes in the roof of the mill; the lack of trace marks on the floor where the shell was allegedly found (such trace marks would normally be expected when such a munition penetrates a building); and the fact that the fire which damaged the machinery in the mill broke out on the second floor while the ordnance was found on the first floor.
144. Furthermore, the IAF examined every aerial attack in the vicinity of the mill in the course of the Gaza Operation and found that none of them could have resulted in a hit on the flour mill. Of the seven strikes conducted within a one-kilometer radius of the mill using the particular munitions identified, five had hit their precise target (the closest one being approximately 300 meters away from the mill). The impact sites of the two additional strikes were visible in the IAF aerial footage of the operation, and the closer of the two landed a full 350 meters from the mill.
145. After reviewing the findings of this additional investigation, the MAG could not affirmatively determine how the ordnance had found its way into the mill, but reaffirmed that the flour mill had not been intentionally targeted by the IAF. He was also unable to rule out the possibility that the ordnance had been deliberately planted in the mill. Accordingly, the MAG determined that there was no basis for additional proceedings in this matter.

⁶⁵ This discrepancy was important not only because of its effect on the credibility of the IDF command investigation, but also because of the perception of a pre-planned air strike intended to destroy the mill.

IV. SUMMARY OF CHANGES TO MILITARY OPERATIONAL GUIDELINES AS A RESULT OF INVESTIGATIONS OF GAZA OPERATION

146. The Gaza Operation presented complex military challenges in protecting civilians from the hazards of battle. Urban warfare and the cynical choice made by Hamas to imbed itself in civilian urban areas and to use civilian structures as shields contributed to the great challenges for Israeli air and ground forces. The IDF nonetheless made extensive efforts to avoid civilian casualties and limit damage to private property, as well as to ensure that Israeli military activities were conducted in compliance with the Law of Armed Conflict and Israel's own stringent ethical and legal requirements.
147. Israel recognizes that, despite these efforts, the Gaza Operation resulted in numerous deaths and injuries to Palestinian civilians and considerable damage to private property. The Government of Israel did not wish these losses. Israel believes that the fact that Hamas chose to conduct its military operations from urban areas and to put its own civilian population at risk significantly contributed to the number of casualties and extent of harm to civilian property in the course of the Operation.
148. Israel will continue to conduct comprehensive investigations into every allegation of misconduct by the IDF during the Gaza Operation. Aside from the review conducted by the MAG of legal aspects of such investigations, the factual findings will be valuable in drawing "lessons learned"—a self-scrutiny conducted by the IDF as a responsible and professional military. The effort to protect civilians and avoid damage to civilian property is a core concern, and will remain such in any future military operations.
149. In particular, the IDF has issued two new Orders designed to further increase the protection of civilians and civilian property during armed conflicts.

A. New Written Procedures Regarding Protection of Civilians in Urban Warfare

150. The IDF has adopted important new written procedures and doctrine designed to enhance the protection of civilians in urban warfare, including by further emphasizing that the protection of civilians is an integral part of a commander's mission. In addition, the procedures require increased attention to civilian matters in operational planning. Although protection of civilians during military operations has long been part of IDF training and doctrine, the new procedures mandate additional comprehensive protection. These revised procedures stem from general understandings and lessons learned both in Gaza and other military operations conducted by Israel in recent years.

151. The new procedures and doctrine also specify steps to better insulate the civilian population from combat operations and to limit unnecessary damage to civilian property and infrastructure, and require integration of civilian interests into the planning of combat operations. This involves advance research into and the precise identification and marking of existing infrastructure, including that pertaining to water, food and power supplies, sewage, health services, educational institutions, religious sites, economic sites, factories, stores, communications and media, and other sensitive sites as well as cultural institutions.
152. Furthermore, the new written procedures mandate the planning for a number of additional provisions aimed at safeguarding the civilian population. This includes: safe havens for civilians to take refuge; evacuation routes for civilians to safely escape combat areas; medical treatment for civilians; methods for effectively communicating with and instructing the population; and provisions for humanitarian access during curfews, closures and limitations on movement. Finally, the new written procedures require the assignment of a Humanitarian Affairs Officer integrated in each combat unit beginning at the battalion level and up,⁶⁶ with responsibilities for advising the commanding officer and educating the soldiers with regard to: the protection of civilians; civilian property and infrastructure; the planning of humanitarian assistance; the coordination of humanitarian movement; and the documentation of humanitarian safeguards employed by the IDF.
153. While the majority of these issues were already addressed in various operational orders and guidelines in existence prior to the Gaza Operation, the new revised procedures are important because they are comprehensive and applicable to all stages of military operations, including the crucial stage of planning.

B. New Order Regulating the Destruction of Private Property for Military Purposes

154. In the aftermath of the Gaza Operation, the destruction of private property and infrastructure by ground forces was the subject of one of the five special command investigations ordered by the IDF Chief of General Staff. One of the lessons learned from this investigation was that there should be a set of clear rules and guidelines to assist commanders in making such decisions.
155. Accordingly, upon the Chief of the General Staff's instructions, a new Standing Order on Destruction of Private Property for Military Purposes was formulated. This new standing order, entered into force in October 2009, and addresses in clear terms when and under what circumstances civilian structures and agricultural

⁶⁶ This is supplemental to other humanitarian mechanisms which were established in the past and were in place during the Gaza Operation, such as a 24-hour operations room by the Gaza Coordination and Liaison Administration to facilitate communication between IDF and international organizations, as described in the *Operation in Gaza Report*, ¶¶ 266-82.

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infrastructure may legitimately be demolished in circumstances of imperative military necessity. It clarifies the applicable legal criteria and limitations and allocates specific command responsibility and hierarchical authority for decision-making.

156. Following the issuance of this new Standing Order, the IDF continues to study the issue of protection of private property and to consider additional changes to its procedures. For instance, the MAG, in the course of his review of a specific incident involving destruction of property, has recommended several additional clarifications to the new order, including: (a) identifying more clearly sites that are considered to be especially “sensitive” and whose destruction should require more senior level of approval; (b) analyzing and addressing how the issue of proportionality should be implemented in different situations; and (c) better incorporating the new Standing Order at all levels and regions of command.

* * *

157. Israel’s prior reports on its investigations of the Gaza Operation described other operational changes that the IDF is considering or implementing based on lessons learned in the command investigations. These include:
- a. In connection with the review of operations affecting incidents involving harm to U.N. and other international facilities, the IDF Chief of General Staff re-emphasized the importance of better familiarizing IDF units at all levels with the location of sensitive facilities within their assigned combat zones. He ordered that regulations regarding safety distances from sensitive facilities be highlighted, specifically with regard to the use of artillery, and also ordered that additional steps be looked at to improve the coordination between the IDF and U.N. agencies in the field.
 - b. The IDF Chief of General Staff has ordered improvement in training and procedures, including practice by all forces in “incidents and responses” drills with specific humanitarian aspects, including involving prevention of harm to medical crews, facilities and vehicles. He also ordered an examination of the operation of the humanitarian corridors opened for the benefit of the local population during the fighting. The formulation of a new operational order on this topic is underway.
 - c. The IDF Chief of General Staff ordered the establishment of a clear doctrine and orders on the issue of various munitions which contain white phosphorous. These instructions are currently being implemented.

V. THE TURKEL COMMISSION MANDATE TO EXAMINE ISRAEL'S SYSTEM OF INVESTIGATIONS

158. While the State of Israel is confident in the thoroughness, impartiality, and independence of its investigatory system, in light of recent criticisms concerning Israel's mechanisms for examining and investigating complaints raised in relation to violations of the Law of Armed Conflict, the Government of Israel has mandated an independent public commission to examine the conformity of these mechanisms with Israel's obligations under international law, as detailed below.
159. On 14 June 2010 an independent public commission was set up by the Government of Israel to address issues pertaining to a maritime incident involving the IDF which occurred on 31 May 2010, and which is unrelated to the Gaza Operation. The Commission is headed by retired Justice of Israel's Supreme Court Yaakov Turkel, joined by Professor Shabtai Rosenne, a leading expert in international law, and Amos Horev, a retired general and former president of the Technion—Israel Institute of Technology. In addition, two international observers, Nobel Peace Prize Laureate Lord William David Trimble from Northern Ireland and former Canadian Judge Advocate General Kenneth Watkin, were appointed to participate in the Commission's hearings and proceedings.
160. In addition to its responsibilities related specifically to the maritime incident, the Commission's scope of responsibility includes a broad mandate that goes beyond the events of 31 May 2010 and includes examining:
- the question of whether the mechanism for examining and investigating complaints and claims raised in relation to violations of the laws of armed conflict, as conducted in Israel generally, and as implemented with regard to the present incident, conform with the obligations of the State of Israel under the rules of international law.⁶⁷
161. Thus, one of the central tasks of the new independent public commission is to examine and assess the current mechanisms in place in Israel for investigating allegations of a violation of the Law of Armed Conflict. The mechanisms under review are the same mechanisms that are implemented in the investigations relating to the Gaza Operation and which were discussed in detail in this Paper and the two previous reports.
162. The Government's decision sets forth that every relevant governmental body will cooperate fully with the Commission and will make available to the Commission information and documents required by it for the purposes of performing its

⁶⁷ Israeli Ministry of Foreign Affairs, *Government Establishes Independent Public Commission* ¶ 5 (14 June 2010), available at http://www.mfa.gov.il/MFA/Government/Communiques/2010/Independent_Public_Commission_Maritime_Incident_31-May-2010.htm.

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function. Furthermore, the Commission has the power to subpoena witnesses, to enforce their appearance before the Commission, and to compel their testimony.

163. Upon completion of its work, the Commission will submit a report to the Government of Israel, by way of the Prime Minister. The report will also be made available to the public.

VI. CONCLUSION

164. Since the *January 2010 Update*, Israel has made significant progress investigating allegations of misconduct by the IDF during the Gaza Operation. Israel has devoted extensive resources to conducting thorough and independent investigations, including interviews of hundreds of IDF soldiers and Palestinian civilians.
165. The IDF has conducted numerous command investigations of operational activity in the course of the Operation. The MPCID has opened 47 criminal investigations, and the MAG has initiated criminal prosecutions of four soldiers in separate incidents. Six officers have been disciplined or subject to command sanctions.
166. In other cases, the MAG has concluded that IDF actions did not violate the Law of Armed Conflict or IDF orders. Israel's investigations are ongoing, and Israel remains committed to investigating allegations regarding violations of the Law of Armed Conflict.
167. As part of its continuous learning process, the IDF has also made numerous changes to its operational procedures and policies in order to further enhance the protection of civilians from the hazards of battle and the protection of private property during military operations.